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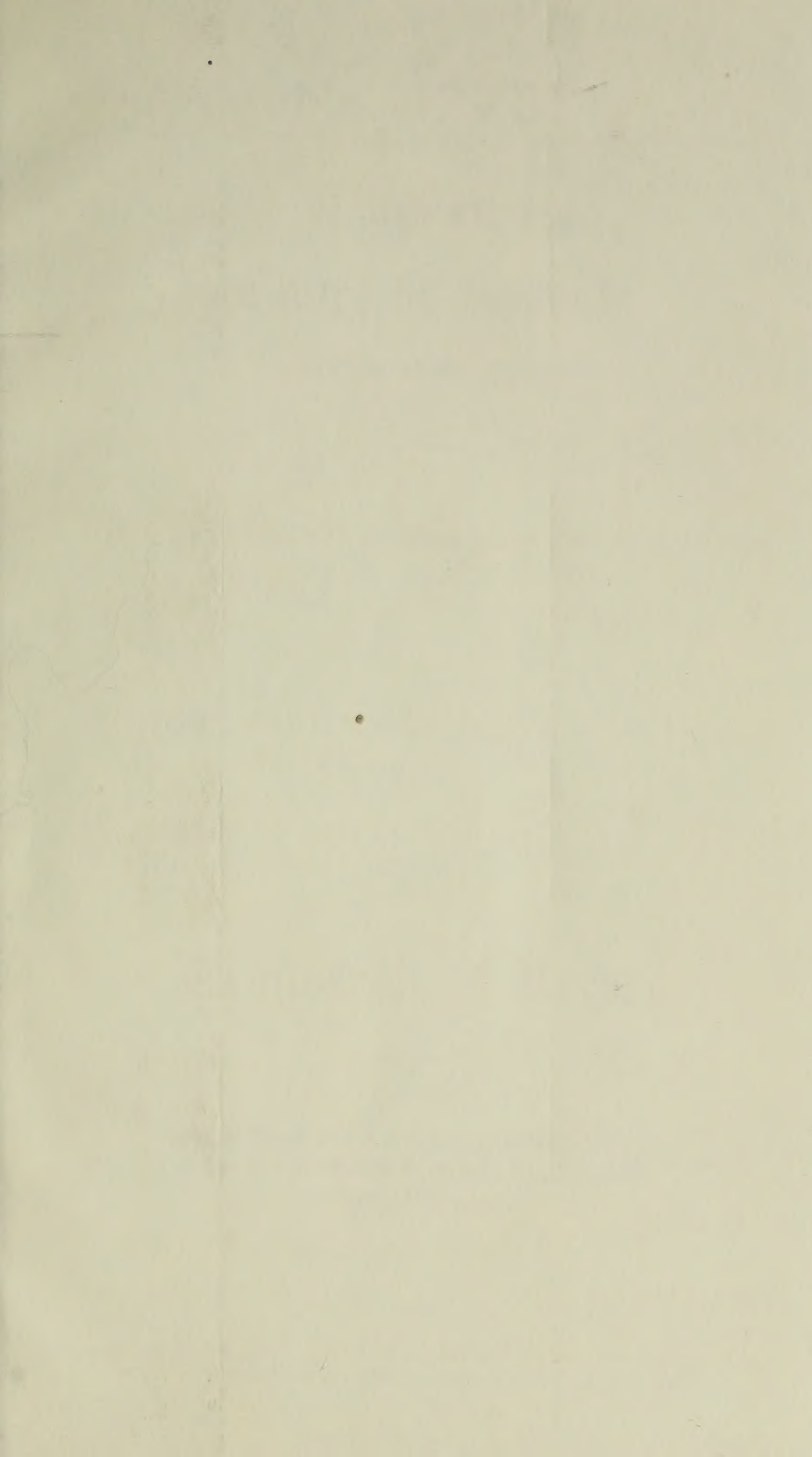


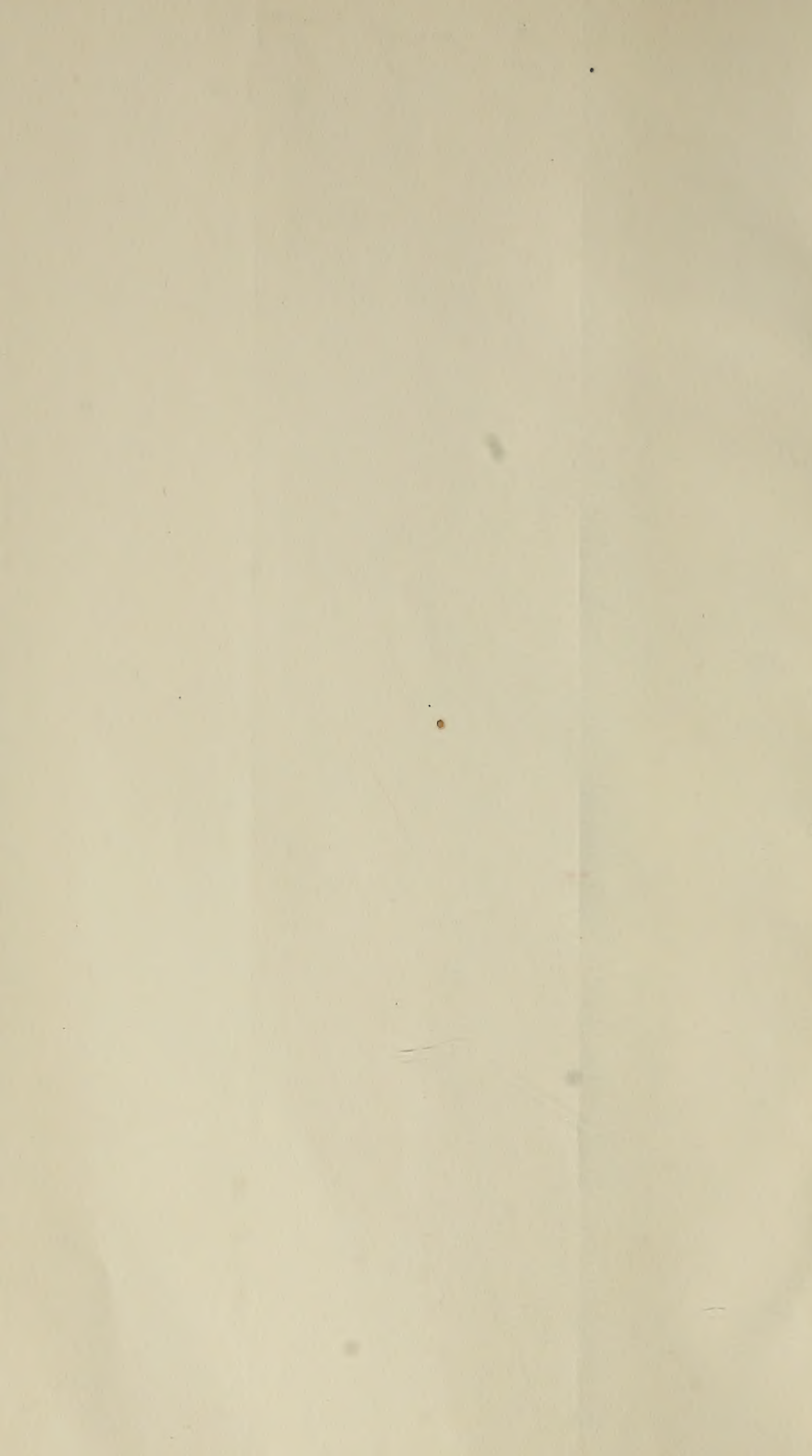
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2587  
No. 12281

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United States  
Court of Appeals  
For the Ninth Circuit.

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MRS. LEE BROOKS, Also Known as Mrs. Gwend-  
lyn Brooks,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of  
the Housing Expediter,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the Southern District of California  
Central Division

FILED  
SEP 26 1949

PAUL P. O'BRIEN,  
CLERK





**No. 12281**

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**United States  
Court of Appeals**

**For the Ninth Circuit.**

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**MRS. LEE BROOKS, Also Known as Mrs. Gwend-  
lyn Brooks,**

**Appellant,**

**vs.**

**TIGHE E. WOODS, Housing Expediter, Office of  
the Housing Expediter,**

**Appellee.**

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**Transcript of Record**

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**Appeal from the United States District Court  
for the Southern District of California  
Central Division**





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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# NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

E. W. MILLER,  
ELON G. GALUSHA,  
417 S. Hill St.,  
Los Angeles 13, Calif.

For Appellee:

ABE I. LEVY,  
FRANK L. HIRST,  
STEPHEN D. MONAHAN,  
ASHER SCHEIR,  
BENJAMIN CHAPMAN,  
RICHARD G. SOLOF,  
CHRISTIAN V. MURRAY,  
1206 Santee St.,  
Los Angeles 15, Calif. [1\*]

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\* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States, Southern  
District of California, Central Division

No. 8459-PH

TIGHE E. WOODS, HOUSING EXPEDITER,  
OFFICE OF THE HOUSING EXPEDITER,  
Plaintiff,

vs.

MRS. LEE BROOKS, also known as MRS.  
GWENDYLN BROOKS, DOES I TO X,  
Defendants.

COMPLAINT FOR RESTITUTION AND  
INJUNCTION

For a First Cause of Action

I.

Plaintiff, as Housing Expediter, Office of the Housing Expediter, brings this cause of action for restitution pursuant to Section 205(a) to enforce compliance with Section 4 of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator pursuant to Section 2 of the Emergency Price Control Act of 1942, as amended, and/or brings this cause of action pursuant to Section 206 of the Housing and Rent Act of 1947, as amended, 50 U.S.C. Appendix 1881-1902, Public Law 464—80th Congress, 2d Session, and the Rent Regulations issued pursuant thereto.

## II.

Jurisdiction of this cause of action is conferred upon this Court [2] by Sections 205 (c) of the Emergency Price Control Act of 1942, as amended, and/or Section 206 of the Housing and Rent Act of 1947, as amended.

## III.

At all times mentioned herein prior to July 1, 1947, there was in effect a Rent Regulation for Housing issued pursuant to Section 2(b) of the Emergency Price Control Act of 1942, as amended, for the Los Angeles Defense Rental Area. At all times mentioned herein between July 1, 1947 and March 31, 1948, inclusive, there was in effect a Rent Regulation for Controlled Housing issued pursuant to Section 204(d) of the Housing and Rent Act of 1947 for said Defense Rental Area. At all times mentioned herein after March 31, 1948, there was in effect a Rent Regulation for Controlled Housing issued pursuant to Section 204(d) of the Housing and Rent Act of 1947, as amended, for said Defense Rental Area. At all times mentioned herein prior to July 1, 1947, the housing accommodations herein described have been subject to maximum rents authorized and established by the Emergency Price Control Act of 1942, as amended, and the said Regulations issued thereunder. At all times mentioned herein between July 1, 1947 and March 31, 1948, inclusive, said housing accommodations have been subject to maximum rents author-

ized and established by the Housing and Rent Act of 1947 and said Regulations issued thereunder. At all times mentioned herein after March 31, 1948, said housing accommodations have been subject to maximum rents authorized and established by the Housing and Rent Act of 1947, as amended, and said Regulations issued thereunder.

#### IV.

That the defendants, Doe I to Doe X, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued. [3]

#### V.

That the defendant is a resident of the City of Los Angeles, County of Los Angeles, State of California, in the Southern District of California, in the Central Division thereof. Defendant is within the jurisdiction of this Court.

#### VI.

During all times herein mentioned the housing accommodations known and described as 1742 West 36th Street, Los Angeles, California have been located within said Defense Rental Area.

#### VII.

Defendant received from persons for the use



and occupancy of the said accommodations rents in excess of the maximum rents established by said Rent Regulations. A Schedule is attached hereto and by reference made a part hereof, as though fully set out herein. Said Schedule states the names of the persons occupying said accommodations and the period of occupancy of such persons. Said Schedule states the rents received from said persons during said times. Said Schedule states the legal maximum rent for said accommodations during said times. Said Schedule states the amount of the overcharges received from said persons during said times.

## For a Second Cause of Action

Plaintiff re-alleges and incorporates herein Paragraphs I, II, III, IV, V, VI and VII of his first cause of action as though set out in full herein.

## II.

In the judgment of the Housing Expediter, Office of the Housing Expediter, said defendants have engaged in acts and practices in violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and/or in violation of Section 206(a) of the Housing and Rent Act of 1947, as amended, 50 U.S.C. Appendix 1881-1902, Public Law 464—80th Congress, 2d Session, which acts and practices consist of violations of Rent Regulations for controlled Housing. [4] (10 Fed. Reg. 13528) issued

in accordance with Section 2(b) of the Emergency Price Control Act of 1942, as amended, and/or the Controlled Housing Rent Regulation issued pursuant to the Housing and Rent Act of 1947, and therefore the Housing Expediter brings this cause of action pursuant to the provisions of Section 206 of the Housing and Rent Act of 1947, as amended. Jurisdiction of this cause of action is conferred by Section 206 of the Housing and Rent Act of 1947, as amended.

WHEREFOR, the plaintiff demands:

A. That the defendant be ordered and directed to tender to all available tenants as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Emergency Price Control Act of 1942, as amended, and Regulations issued thereunder, and/or the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, which were received by the defendant, his agents, servants, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by said Acts and said Regulations.

B. A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation with them from:

1. Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or

from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other essential services and utilities, or threatening to do any of the foregoing.

2. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

3. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded, by accepting, demanding, or receiving, [5] in any form or manner, rents higher than the established maximum rent prescribed therein.

4. Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

ABE I. LEVY,  
STEPHEN D. MONAHAN,  
FRANK L. HIRST,  
RICHARD G. SOLOF,  
CASSEL JACOBS,

By /s/ CASSEL JACOBS,

Attorneys for Plaintiff. [6]

Housing accommodations located at 1742 West 36th Street, Los Angeles, California.

Unit	Name of Tenant	Period of Overcharges	Amount Rent Pd.	Maximum Rent	Amount of Overcharges
Dining Room & East Frt. Bedroom	Mrs. Harold White.....	6-5-44 to 4-22-47	\$15.50 Week	\$10.00 Week	\$797.50
Porch Room Northwest	Mrs. Mary Woodfaulk.....	12-11-46 to 5-17-47	8.50 Week	4.50 Week	76.00
Corner	Mrs. Mary Woodfaulk.....	5-17-47 to 9-13-47	7.50 Week	4.50 Week	51.00
Total Amount of Overcharges.....					<u>\$924.50</u>

Statement referred to in Paragraph VII of Plaintiff's First Cause of Action.

[Endorsed]: Filed July 23, 1948. [7]



[Title of District Court and Cause.]

### ANSWER

Comes now the defendant and for answer to plaintiff's complaint herein, alleges, admits and denies:

#### I.

Denies, generally and specifically, each, every and all the allegations contained in paragraph VII, in plaintiff's first cause of action herein, in its complaint contained. Denies that the total amount of overcharges is the sum of \$924.50, or any other sum, or any sum at all; denies that the amount of overcharges of Mrs. Harold White is the sum of \$797.50, or any other sum, or at all; denies that the amount of overcharges by Mrs. [8] Mary Woodfaulk is the sum of \$76.00, or any other sum, or any sum at all; denies that the amount of overcharges of Mrs. Mary Woodfaulk is the sum of \$51.00, or any other sum, or any sum at all. On information and belief denies paragraph III thereof.

#### II.

Denies, generally and specifically, each, every and all the allegations contained in paragraphs I and II, in plaintiff's Second Cause of Action in plaintiff's complaint contained, except those matters admitted as to plaintiff's First Cause of Action.

Wherefore, defendant prays judgment against plaintiff; that plaintiff take nothing by its com-

plaint herein, and that the defendant go hence with her costs.

/s/ EDGAR G. WENZLAFF,  
Attorney for the Defendant.

---

State of California,  
County of Los Angeles—ss:

Mrs. Lee Brooks being by me first duly sworn, deposes and says: that she is the one of the defendants and also known as Gwendyln Brooks in the above entitled action: that she has read the foregoing answer and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ MRS. LEE BROOKS.

Subscribed and sworn to before me this 9th day of August, 1948.

[Seal] /s/ EDGAR G. WENZLAFF,

Notary Public in and for the County of Los Angeles,  
State of California.

Copy received.

[Endorsed]: Filed Aug. 10, 1948. [10]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND JUDG-  
MENT.

To the Attorneys for Plaintiff Herein and to the  
Above Entitled Court:

Defendant hereby objects to paragraph numbered  
7 of plaintiff's Findings of act and the Conclusions  
of law based thereupon on the ground that said  
figures and amounts of damages are predicated  
upon an erroneous and fraudulent maximum rental  
certificate and upon an insufficiency of the evidence  
and that said judgment is against law.

Respectfully,

/s/ EDGAR G. WENZLAFF,  
Attorney for defendant.

Overruled Dec. 2, 1948.

/s/ CHARLES C. CAVANAH,  
U.S. District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed Dec. 1, 1948. [22]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff having filed his complaint for restitution and injunction, and the defendant Mrs. Lee Brooks, also known as Mrs. Gwendyln Brooks, having filed her answer thereto, and the matter having come on for trial on November 19th and 20th, 1948, before the Honorable Charles C. Cavanah, judge presiding without a jury, a jury having been waived by the parties hereto, and the plaintiff being represented by Richard G. Solof, Esq., and said defendant being represented by Edgar G. Wenzlaff, Esq., and both oral and documentary evidence having been introduced, and the Court being fully advised in the premises, the Court now makes the following:

### Findings of Fact

1. That the plaintiff as Housing Expediter, Office of the Housing Expediter, is the proper party plaintiff duly authorized to bring this action under and pursuant to the Emergency Price Control Act of 1942, as amended, [24] and the Housing and Rent Act of 1947, as amended.

2. That this Court has jurisdiction of the defendant Mrs. Lee Brooks, also known as Mrs. Gwendyln Brooks.

3. That at all times pertinent to this action the Rent Regulation for Housing, issued pursuant to Section 2(a) of the Emergency Price Control Act



of 1942, as amended, and the Controlled Housing Rent Regulation, issued pursuant to the Housing and Rent Act of 1947, as amended, were in full force and effect in the Los Angeles Defense Rental Area.

4. That said defendant at all times pertinent to this action, was a resident of the City of Los Angeles, County of Los Angeles, State of California.

5. That at all times hereinafter mentioned in Paragraph 7 below, said defendant has been and is now the owner and landlord of housing accommodations located at 1742 West 36th Street, in the City of Los Angeles, State of California, and more particularly hereinafter described in the said Paragraph 7.

6. That the aforesaid housing accommodations are located within said Defense Rental Area, said accommodations being subject to said Rent Regulation for Housing and said Controlled Housing Rent Regulations.

7. That said defendant received from the following persons for the use and occupancy of the following apartments in the aforesaid housing accommodations located at 1742 West 36th Street, Los Angeles, California, rents in excess of the maximum rents established by the aforesaid Acts and Regulations as follows:

Unit	Name of Tenant	Period of Overcharges	Amount Rent Paid Week	Maximum Rent Week	Amount of Overcharges
Dining Room & East	Mrs. Harold White.....	6-5-44 to 3-17-47	\$15.50	\$10.00	\$747.50
Fr't. Bedroom					
Porch Room	Mrs. Mary Woodfaulk.....	12-11-46 to 5-17-47	8.50	4.50	76.00
Northwest Corner	Mrs. Mary Woodfaulk.....	5-17-47 to 9-13-47	7.50	4.50	51.00
Total amount of Overcharges.....					<u>\$874.50</u>

From the above Findings of Fact the Court makes the following:

### Conclusions of Law

1. That plaintiff is entitled to an order requiring the defendant Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks to refund to all of the tenants listed in Paragraph 7 above, the rental overcharges demanded and received from said tenants by said defendant, as shown in said Paragraph 7 above.

2. That the defendant has violated Section 2(a) of the Rent Regulation for Housing and Section 2(a) of the Controlled Housing Regulation, and therefore has violated the provisions of the Emergency Price Control Act of 1942, as amended, and the provisions of the Housing and Rent Act of 1947, as enacted and amended.

3. That plaintiff is entitled to a permanent injunction enjoining the defendant, her agents, servants, employees, attorneys, and all other persons in active concert or participation with said defendant from directly or indirectly demanding or receiving for accommodations subject to the Rent Regulations issued pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, rents in excess of the maximum rents permitted under the Rent Regulations issued pursuant

to the Housing and Rent Act of 1947, as heretofore or hereafter amended.

Dated: at Los Angeles, California, this 2nd day of December, 1948.

/s/ CHARLES C. CAVANAH,  
U.S. District Court Judge.

Approved as to form:

ABE I. LEVY,  
STEPHEN D. MONAHAN,  
FRANK L. HIRST,  
RICHARD G. SOLOF,

By /s/ RICHARD G. SOLOF,  
Attorneys for Plaintiff. [26]

Receipt of a copy of the within Findings of Fact and Conclusions of Law is hereby acknowledged at 11:10 o'clock a.m., this 26th day of November, 1948.

/s/ EDGAR G. WENZLAFF,  
Attorney for Defendant, Mrs.  
Lee Brooks, also known as  
Mrs. Gwendyln Brooks.

[Endorsed]: Filed Dec. 2, 1948. [27]



In the District Court of the United States for the  
Southern District of California, Central Division

No. 8459-PH

TIGHE E. WOODS, HOUSING EXPEDITER,  
OFFICE OF THE HOUSING EXPEDITER,  
Plaintiff,

vs.

MRS. LEE BROOKS, also known as MRS.  
GWENDYLN BROOKS, DOES I to X,  
Defendants.

JUDGMENT AND DECREE FOR  
PERMANENT INJUNCTION

The above entitled cause having come on for trial on November 19th and 20th, 1948, before the Honorable Charles C. Cavanah, judge presiding without a jury, a jury having been expressly waived, the plaintiff being represented by Richard G. Solof, Esq., and the defendant Mrs. Lee Brooks, also known as Mrs. GwendylN Brooks, being represented by Edgar G. Wenzlaff, Esq., and both oral and documentary evidence having been introduced, and the Court having made its Findings of Fact and Conclusions of Law, and sufficient reason appearing therefor;

Now, Therefore, it is Ordered, Adjudged and Decreed, that:

1. Judgment shall be and it is hereby entered in favor of the plaintiff, on behalf of the United States Government, and against the defendant Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks, for the sum of Eight Hundred, Seventy-four and 50/100 Dollars (\$874.50), and that same [28] be paid to the plaintiff in the form of bank drafts, cashier's or certified checks or postal money orders, made payable to the Treasurer of the United States, as follows:

Two Hundred, Ninety-one and 50/100 Dollars  
(\$291.50) on or before February 1, 1949;

Two Hundred, Ninety-one and 50/100 Dollars  
(\$291.50) on or before April 1, 1949;

Two Hundred, Ninety-one and 50/100 Dollars  
(\$291.50) on or before June 1, 1949.

2. Upon payment of the sums referred to in Paragraph 1 above, same shall be disbursed by plaintiff to the following persons in the following amounts:

Mrs. Harold White.....\$747.50

Mrs. Mary Woodfaulk..... 127.00

3. In the event plaintiff should be unable to locate any of the persons named in Paragraph 2 above, the amount to which said person or persons are entitled shall be retained by the Treasurer of the United States.

4. Upon default by the said defendant of any of the payments mentioned in Paragraph 1 above, all

of the payments provided for in said Paragraph 1 shall immediately become due and payable, at which time plaintiff shall have the right to levy execution to collect all of the payments mentioned in said Paragraph 1.

5. No execution shall issue on this judgment for a period of thirty (30) days from the date of entry thereof.

6. The complaint be and it is hereby dismissed as to defendants Does I to X.

7. The defendant Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks, her agents, servants, employees and all persons in active concert or participation with her be, and they are hereby permanently enjoined and restrained from directly or indirectly demanding and receiving for housing accommodations subject to the Rent Regulations issued pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended or super-

seded, rents in excess of the maximum rents permitted under said Act and Regulation.

Dated: at Los Angeles, California this 2nd day of Dec. 1948.

CHARLES C. CAVANAH

U.S. District Court Judge.

Approved as to form:

ABE I. LEVY,  
STEPHEN D. MONAHAN,  
FRANK L. HIRST,  
RICHARD G. SOLOF,

By RICHARD G. SOLOF,  
Attorneys for Plaintiff.

Receipt of a copy of the within Judgment and Decree for Permanent Injunction is hereby acknowledged at 11:10 o'clock a.m., this 26th day of November, 1948.

/s/ EDGAR G. WENZLAFF,  
Attorney for Defendant, Mrs.  
Lee Brooks, also known as  
Mrs. Gwendyln Brooks.

[Endorsed]: Filed Dec. 2, 1948. [30]



United States District Court, Southern District of  
California, Central Division

NOTICE BY CLERK OF ENTRY OF  
JUDGMENT

Edgar G. Wenzlaff, Esq.,  
Attorney at Law,  
422 Subway Terminal Bldg.,  
Los Angeles 13, Calif.

Abe I. Levy, Esq.,  
Richard G. Solof, Esq.,  
Attorneys, Office Housing Expediter,  
1206 Santee Street,  
Los Angeles 15, Calif.

Re; Tighe E. Woods, OHE, v. Mrs. Lee  
Brooks, etc., et al, No. 8459-PH.

You are hereby notified that Judgment has been  
entered this day in the above-entitled case, in Judgment  
Book No. 54, page 322.

Dated: Los Angeles, California, December 2, 1948.

EDMUND L. SMITH,  
Clerk,

By /s/ C. A. SIMMONS,  
Deputy Clerk. [31]

[Title of District Court and Cause.]

## NOTICE OF MOTION FOR NEW TRIAL

To: Tighe E. Woods, Housing Expediter, Office of the Housing Expediter and to Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof, Esqs., his attorneys:

You, and each of you, will please take notice that the defendant, Mrs. Lee Brooks, also known as Mrs. Gwendyln Brooks, in the above entitled action, intends to move the above entitled court to vacate and set aside the decision rendered in the above-entitled action and to grant a new trial of said cause on the following grounds materially affecting the substantial rights of the defendant, to wit:

### I.

That the decision is against the law in that the evidence showed a change in the Office of the Price Administration Order, which evidence is uncontradicted by either fraud or mistake, and the court ruled [32] against defendant on such evidence on an erroneous theory of law that defendant could not attack the validity of the Order, a legal point not involved in the case.

### II.

That the decision is contrary to the evidence in that the evidence requiring a decision for defendant is uncontradicted and cannot be affected by the

erroneous conclusion of law applied to the case by the trial court.

### III.

That the evidence is insufficient to justify the decision in that the evidence in favor of defendant is uncontradicted in the case.

Said motion will be made upon the Minutes of the Court and upon all the records in this case.

Dated: This 13th day of December, 1948.

/s/ E. W. MILLER,

Attorney for Defendant. [33]

### AFFIDAVIT OF SERVICE BY MAIL

State of California,

County of Los Angeles—ss.

M. Dunn, being first duly sworn says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business address is: 435 Subway Terminal Building, 417 South Hill Street, Los Angeles, California, that on the 13th day of December, 1948, affiant served the within Notice for Motion for New Trial on the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiff at the office address of said attorneys, as follows: "Messrs. Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G.

Solof, Office of the Housing Expediter, 1206 Santee Street, L. A. 15, California''; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person, by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication mail between the place of mailing and the place so addressed.

/s/ M. DUNN.

Subscribed and sworn to before me this 13th day of December, 1948.

[Seal]      /s/ E. W. MILLER,

Notary Public in and for the County of Los Angeles, State of California.

Copy received.

[Endorsed]: Filed Dec. 13, 1948. [34]



[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

E. W. Miller, Esq., is hereby substituted for, and in the place of Edgar G. Wenzlaff, Esq., as attorney for Mrs. Lee Brooks, also known as Mrs. Qwendyln Brooks, defendant in the above entitled action.

Dated: This 10th day of December, 1948.

/s/ MRS. LEE BROOKS,

Mrs. Lee Brooks, also known as Mrs. Gwendyln Brooks.

I Hereby Consent to the Above Substitution.

Dated: This 10th day of December, 1948.

/s/ EDGAR G. WENZLAFF.

I Hereby Accept the Above Substitution.

Dated: This 10th day of December, 1948.

/s/ E. W. MILLER.

Copy received.

[Endorsed]: Filed Dec. 14, 1948. [35]

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At a stated term, to wit: The September Term. A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los

Angeles on Monday, the 31st day of January, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,  
District Judge.

[Title of Cause.]

For hearing on motion of defendant for a new trial, pursuant to notice thereof filed Dec. 22, 1948; R. G. Solof, Esq., appearing as counsel for plaintiff; E. W. Miller, Esq., appearing as counsel for defendant;

Attorney Miller makes a statement; and Attorney Solof makes a statement;

Court orders that the cause as to said motion stand submitted on briefs to be filed 10 x 5. [36]

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[Title of District Court and Cause.]

### MOTION TO DISMISS

To Plaintiff, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, in the above entitled action, and to Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof, and Cassel Jacobs, Esqs., attorneys for plaintiff:

You, And Each Of You, will please take notice that, in connection with the Motion for New Trial now under consideration by this court heretofore submitted, and without asking for a hearing in open court, defendant moves this court for an

order dismissing this action, on the following grounds, to wit:

I.

That this court has no jurisdiction over this action for the reason that there was another action pending on the principal cause of this action herein, said action being Municipal Court Number 819627, commenced July 30, 1947, entitled Mrs. Harold White, formerly [37] Inez Hatchett, plaintiff, vs. Gwendlyn Brooks, also known as Gwendyln Brooks Fox and Lee Brooks, defendants, at the time of the commencement of this action on July 23rd, 1948, which court had jurisdiction, and now has jurisdiction, of the cause of action relative to the overcharges claimed by said White, plaintiff in said Municipal Court action 819627.

II.

That this court has no jurisdiction in equity over any of the matters for which relief is sought herein for the reason that both claimants White and Woodfaulk had removed from, and were not residing on, the premises at the time this injunction suit was filed on July 23rd, 1948, said White having vacated said premises on April 17, 1947, and Woodfaulk having vacated said premises on September 13, 1947.

III.

That neither said complaint nor the first or second causes of action state facts sufficient to constitute a cause of action herein in that this is a penal action and Count I does not state definitely

whether it is under the 1942 statute or the 1947 statute, the allegations reading 1942 "and/or" 1947 and the allegations in regard to penal actions for collection of penalties must be definite.

#### IV.

That plaintiff is barred by the statute of limitations and guilty of laches in that this injunctive action was filed more than one year after the 1947 enactment effective July 1st, 1947, it being filed 22 days after one year if it is deemed brought under the 1942 statute as amended.

#### V.

Said motion will be based upon the ground of lack of jurisdiction and that the complaint does not state facts sufficient to constitute a cause of action and it will be based: [38]

(1) Upon points and authorities filed herewith;

(2) The file in said Municipal Court action No. 819627;

(3) The Minute Orders of September 11th and September 12th, certified copies of which are filed herewith, showing said action pending at this time and at the time of the filing of this action;

(4) Affidavits of Edgar G. Wenzlaff, E. W. Miller, and Mrs. Lee Brooks, filed herewith, and upon all the files, papers and pleadings herein.

Dated: This 9th day of February, 1949.

/s/ E. W. MILLER,

Attorney for Defendant. [39]

In the Municipal Court, City of Los Angeles,  
County of Los Angeles, State of California.  
Case Number 819627. White, plaintiff vs.  
Brooks, et al, defendant.

### MINUTE ORDER

Friday, September 12, 1947. Division 21.

Convened at 10 a.m., Present Hon. Frank G. Tyrrell, Judge; O. A. Hough, Deputy Clerk; and the following proceedings were had:

819627 White vs. Brooks, et al. No appearances. Cause called for Court's own Motion. On Court's own Motion, Order made September 11, 1947, granting plaintiff's Motion to dismiss action is Vacated and set aside. Further proceedings subject to stipulation of counsel.

I certify the foregoing Minutes were entered on September 15, 1947; and the foregoing Judgment was entered on date indicated and certified copy compared.

/s/ IONE KOENIG,  
Deputy Clerk.

The Foregoing Minutes of Division 21—Are Correct.

/s/ O. A. HOUGH,  
Court Clerk.

I Hereby Certify that the above is a full, true and correct copy of the Minute entry for Division 21, September 12, 1947, of the above entitled case



as the same appears in the Minute Book of the Court in the office of the Clerk of the Municipal Court, City of Los Angeles, County of Los Angeles, State of California.

Attest my hand and the seal of said Court this 8th day of February, 1949.

URBAN F. EMME,

Clerk of said Court.

[Seal] By /s/ FAYE A. STONEMAN,  
Deputy. [40]

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In the Municipal Court, City of Los Angeles,  
County of Los Angeles, State of California.  
Case Number 819627. White, plaintiff vs.  
Brooks, defendant.

### MINUTE ORDER

Thursday, September 11, 1947. Division 21.

Convened at 10 a.m., Present Hon. Frank G. Tyrrell, Judge; O. A. Hough, Deputy Clerk; and the following proceedings were had:

819627. White vs. Brooks. Stuart P. Fischer appearing for Plaintiff. Edgar G. Wenzlaff appearing for Defendant. Cause called for trial, whereupon the following proceedings were had: Plaintiff's Motion to dismiss action Granted. Ordered that defendants Gwendolyn Brooks and Lee Brooks recover costs from Mrs. Harold White formerly Inez Hatchett. Copy of judgment certi-

fied. Judgment ordered: Entered September 15, 1947 that on the complaint, defendants Gwendolyn Brooks and Lee Brooks recover from plaintiff Mrs. Harold White formerly Inez Hatchett costs as provided by law, in the sum of \$. . . . .

(See 9/12/47.)

Vacated by Court Order 9-12-47.

I certify the foregoing Minutes were entered on September 15, 1947; and the foregoing Judgment was entered on date indicated and certified copy compared.

/s/ IONE KOENIG,  
Deputy Clerk.

The Foregoing Minutes of Division 21—Are Correct.

/s/ O. A. HOUGH,  
Court Clerk.

I Hereby Certify that the above is a full, true and correct copy of the Minute entry for Division 21, September 11, 1947, of the above entitled case as the same appears in the Minute Book of the Court in the office of the Clerk of the Municipal Court, City of Los Angeles, County of Los Angeles, State of California.

Attest my hand and the seal of said Court this 8th day of February, 1949.

URBAN F. EMME,  
Clerk of said Court.

[Seal] By /s/ FAYE A. STONEMAN,  
Deputy.

[Endorsed]: Filed Feb. 10, 1949. [41]

[Title of District Court and Cause.]

AFFIDAVIT OF MRS. LEE BROOKS RE  
MOTION FOR NEW TRIAL

State of California,  
County of Los Angeles—ss.

Mrs. Lee Brooks, being first duly sworn, deposes and says:

That she is the defendant in this District Court action and that she makes this affidavit in support of the motion for new trial and motion to dismiss, and states as follows:

(1) That the tenant, Mrs. Harold White, formerly Mrs. Inez Hatchett, rented said premises on July 7, 1945, and not before, and that she vacated said premises on April 21, 1947, and did not occupy the same thereafter. That although plaintiff claims under a retroactive order going back to June 5, 1944, the judgment in this action is erroneous and not sustained by the evidence because there was no tenancy and no payments of rental by the tenant White prior to July 7, 1945, making a total of 56 weeks for which she has been [42] charged with an overcharge which has never been paid or collected rendering the judgment excessive and erroneous as to the tenant White in the amount of \$308.00.

(2) That the tenant Mrs. Mary Woodfaulk entered into possession of the premises on Dec. 13, 1946, and occupied the same until Oct. 15, 1947, when she vacated said premises and that during all

of said period said tenant never paid and affiant never received a sum in excess of \$4.50 per week and that the judgment herein is not sustained by the evidence and is contrary to the evidence that any overcharge was ever paid.

(3) That neither of said tenants were in occupation of said premises and had not been for a long time prior to the filing of this action, July 23, 1948, and that affiant never threatened in any way to violate any of the rights of the tenants while they were in possession or at any time thereafter.

(4) That affiant received a notice to register the housing accommodations in question and on receipt of said notice she, within a short time thereafter, went to the office of the Price Administration on June 4, 1947, and registered said tenancy as herein stated, that is, the White tenancy at \$7.50 per week and Woodfaulk tenancy at \$4.50 per week. That the reason for the difference in the amount of rent charged was that the White unit was occupied by two people and the Woodfaulk one person.

(5) That affiant never received any notice subsequent to the 4th day of June, 1947, either by personal service, registered mail or otherwise, notifying her or anyone of the intention on the part of the Price Administrator to change the amount of registration or the maximum amount of rent payable on the White unit, and had no knowledge of any change from \$7.50 on the White unit to \$15.50 as now appears in plaintiff's exhibit 2 in evidence as

enlarged by the enlargement prepared by this defendant and filed herein for the purposes of this motion for new trial and motion [43] to dismiss.

(6) That said registration certificate Exhibit 2-a was subsequently to the time the figures \$7.50 were placed thereon in Paragraphs 3 and 7 thereof by the apparent erasure of the figure "7" in front of the period and the insertion of the figure "1" followed by the figure "5" over the apparent erasure of figure "7", all of which appears more distinctly on the enlargement of said exhibit 2-a filed herein for the purposes of this motion.

That affiant never had the said registration certificate, exhibit 2-a, in her own hands nor did she take the same home with her after the registration and the same was left with her in the possession of Helen Gunthorp, the clerk who took said registration at the office of the O.P.A. That affiant never saw the same again until the same was used as an exhibit in the State Court action No. 819627, now pending.

(7) Relative to the evidence given in this action as to the amount of rent charged and received by affiant on both the White and Woodfaulk units, affiant now states that she never saw, and did not know, and that there was not present at the time of the payment of rent by either of said tenants, the witnesses other than the parties who testified herein that they saw the overcharges claimed herein paid.



(8) Affiant further says that on or about July 30, 1947, there was filed in the Municipal Court of the city of Los Angeles, county of Los Angeles, state of California, an action by Mrs. Harold White, plaintiff v. affiant and her husband, Lee Brooks, for the same overcharges of rental from said White as formed the basis of the damages in this equitable action. That said action was tried in the Municipal Court before Judge Frank G. Tyrrell and a judgment was entered and later set aside and said action is now pending. [44]

That Helen Gunthorp, a witness for the defendant, Mrs. Lee Brooks, in this action, testified upon direct examination that she was employed by the office of the Price Administration at the time defendant, Mrs. Lee Brooks, executed the registration certificate entitled "Plaintiff Exhibit 2-a" and that at the time she prepared said maximum rental certificate the amount of rent was \$7.50 and so written by her on said certificate. That she also gave this testimony at the trial of the case in the Municipal Court. That subsequently at the trial of this case and the case in the said Municipal Court she, Helen Gunthorp, noticed the amount of the rent on said certificate had been changed from \$7.50 to \$15.50.

/s/ MRS. LEE BROOKS,  
Affiant.

Subscribed and sworn to before me this 9th day of February, 1949.

[Seal]     /s/ E. W. MILLER,  
Notary Public in and for said county and state.  
Copy received.

[Endorsed]: Filed Feb. 10, 1949. [45]

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[Title of District Court and Cause.]

AFFIDAVIT OF E. W. MILLER  
RE MOTION FOR NEW TRIAL

State of California,  
County of Los Angeles—ss.

E. W. Miller being first duly sworn, deposes and says:

That he is the present attorney for Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks, the defendant in this action. That this action was originally tried by Edgar G. Wenzlaff, Esq., as attorney for said defendant, Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks. That said Edgar G. Wenzlaff also appeared in the Municipal Court, city of Los Angeles, county of Los Angeles, state of California, as attorney for the said defendant and for her husband, Lee Brooks, said action being numbered 819627, filed in said court on the 30th day of July, 1947, seeking treble damages for violations of the same identical orders as are involved in this action; that attached hereto is the affidavit

of said Edgar G. [46] Wenzlaff showing certain facts as to the procedure therein by the court, the trial of said action in that court, a judgment in favor of said defendant, and the setting aside of said judgment, and the fact that said action is still pending, as appears by the file in said action which has been filed herein as an excerpt, and is hereby referred to and made a part of this affidavit by reference hereto.

Affiant further says that he has examined said file and all papers therein, and has examined the docket in said Municipal Court which shows that the judgment was entered dismissing said action with costs to defendant on September 11, 1947, and that said order was on September 12th, 1947, on Judge Frank G. Tyrrell's own Motion in said action, set aside with further proceedings, subject to stipulation of counsel; that neither said file nor said docket shows any proceedings subsequent to September 12, 1947, in said action and contains no entries showing the filing of any stipulation for further proceedings, but that said docket does show the filing of a stipulation and Order for the withdrawal of exhibits by said Gwendlyn Brooks' attorney in order that the same might be used for exhibits in this District Court action.

Affiant further says that for the purposes of this Motion he has caused to be filed herein and served on the attorneys for plaintiff, Tighe E. Woods, Housing Expediter, and Office of Housing Expediter, a photostatic enlargement of one of the exhibits in this case, a registration statement affecting the

property of Mrs. Harold White for the purpose of showing an erasure and alteration of the maximum rent as fixed by the Office of Price Administration, the change being from \$7.50 to \$15.50, which clearly shows on said sheet on two places, the first in Paragraph No. 3 and the second in Paragraph No. 7, the figures "15" being written over the number "7" erased for that purpose.

/s/ E. W. MILLER.

Subscribed and sworn to before me this 9th day of February, 1949.

[Seal] /s/ EDGAR G. WENZLAFF,  
Notary Public in and for said county and state.

[Endorsed]: Filed Feb. 10, 1949. [47]

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[Title of District Court and Cause.]

AFFIDAVIT OF EDGAR G. WENZLAFF  
RE MOTION FOR NEW TRIAL

State of California,  
County of Los Angeles—ss.

Edgar G. Wenzlaff being first duly sworn, deposes and says:

That he was the attorney of record and represented defendant Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks, in the trial of this action, and after the trial of this action E. W. Miller was substituted for and in the place of affiant for attorney for defendant.



Affiant further says he was, and now is, the attorney for said defendant in this action in the Municipal Court action No. 819627 filed in the Municipal Court of the city of Los Angeles, county of Los Angeles, state of California, on July 30, 1947, by Mrs. Harold White, formerly Inez Hatchett, and one of the claimants on behalf of whom this action has been filed by Tighe E. Woods, Housing Expediter. [48]

Affiant further says that said Municipal Court action is still pending; that it was tried in Division 21 of said Municipal Court, and that after the trial judge had expressed his opinion that judgment should be for defendant said action was dismissed with costs to the defendant Brooks. That thereafter, and on the 12th day of September, 1947, the Municipal Court Judge Frank G. Tyrrell, on his own Motion, vacated and set aside said judgment of dismissal and further ordered "further proceedings subject to stipulation of counsel."

Affiant further says that said action No. 819627 pending in said Municipal Court, city of Los Angeles, county of Los Angeles, state of California, is now pending; that no stipulation of counsel was ever filed thereafter and that no disposition of said case has ever been made by said Municipal Court.

That in said Municipal Court action affiant caused a counter claim to be filed on behalf of said Brooks for five weeks rent during which defendant White paid no rent and to which, in affiant's opinion, she was entitled under the Federal Acts involved.



Affiant further says that there was no testimony offered in this Federal case that the registration certificate, an enlargement of which is on file in this action, was ever taken home by Mrs. Lee Brooks after the same was filed in the office of the Price Administration and affiant recalls no testimony on the subject.

Helen Gunthorp, a witness for the defendant, Mrs. Lee Brooks, in this action, testified upon direct examination that she was employed by the office of the Price Administration at the time defendant, Mrs. Lee Brooks, executed the registration certificate entitled "Plaintiff Exhibit 2-a" and that at the time she prepared said maximum rental certificate the amount of rent was \$7.50 and so written by her on said certificate. That she also gave this testimony at the trial of the case in the Municipal Court. [49] That subsequently at the trial of this case and the case in the said Municipal Court she noticed the amount of the rent on said certificate had been changed from \$7.50 to \$15.50.

Affiant further says that plaintiff in this action in the Federal Court introduced no testimony to prove that there was any personal service of a notice on the behalf of the Office of Price Administration for the changing of the registration or the making of any retroactive order effective June 5, 1944, nor was there any evidence introduced that any such notice was served upon defendant, Mrs. Lee Brooks, by registered mail, either by way of

registration certificate or affidavit, or otherwise, to affiant's recollection.

/s/ EDGAR G. WENZLAFF.

Subscribed and sworn to before me this 9th day of February, 1949.

[Seal] /s/ E. W. MILLER,  
Notary Public in and for said county and state.

[Endorsed]: Filed Feb. 10, 1949. [50]

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[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL OF COPIES OF MOTION TO DISMISS AND MINUTE ORDERS, AUTHORITIES IN SUPPORT THEREOF, AFFIDAVIT OF W. E. MILLER, AFFIDAVIT OF EDGAR G. WENZLAFF, AFFIDAVIT OF MRS. LEE BROOKS, SECOND SUPPLEMENTAL BRIEF RE MOTION FOR NEW TRIAL AND COPIES OF MINUTE ORDERS, AFFIDAVIT OF E. W. MILLER, AFFIDAVIT OF EDGAR G. WENZLAFF, AFFIDAVIT OF MRS. LEE BROOKS IN SUPPORT THEREOF

M. Dunn being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles, that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 435 Subway Terminal Building, 417

South Hill Street, Los Angeles, California; that on the 10th day of February, 1949, affiant served the following documents: Motion to Dismiss and Authorities in Support Thereof, Affidavit of E. W. Miller, Affidavit of Edgar G. Wenzlaff, Affidavit of Mrs. Lee Brooks and copy of Minute Orders; and Second Supplemental Brief re Motion for New Trial and Affidavit of E. W. Miller, Affidavit of Edgar G. Wenzlaff, Affidavit of Mrs. Lee Brooks in support thereof, and copy of Minute Orders, in the above entitled action on the attorneys for plaintiff in the above entitled action, to wit: Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof, Cassel Jacobs, Office of the Housing Expediter, 1206 Santee Street, Los Angeles 15, California, by placing a copy of each document in an envelope addressed to said attorneys at the above address, being said attorneys' business address, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ M. DUNN.

Subscribed and sworn to before me this 10th day of February, 1949.

[Seal] /s/ E. W. MILLER,

Notary Public in and for said county and state.

[Endorsed]: Filed Feb. 12, 1949. [51]

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 3rd day of March, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,  
District Judge.

[Title of Cause.]

On Court's own motion, the order heretofore entered herein submitting defendants' motion for a new trial and motion to dismiss is now ordered vacated and set aside and the case re-transferred to the calendar of Judge Cavanah for hearing on March 14, 1949, said case having heretofore been decided by Judge Cavanah after trial. [53]

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 14th day of March, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Chas. C. Cavanah,  
District Judge.

[Title of Cause.]

For hearing motion for a new trial; R. G. Solof, Esq., appearing as counsel for plaintiff; E. W. Miller, Esq., appearing as counsel for defendant, who is present; Attorney Miller argues for defendant; Attorney Solof makes a statement and argues; the Court makes a statement; Attorney Miller argues further; the Court makes a statement; Court orders motion for a new trial overruled, and allows 30 days' stay of execution on the judgment. [54]



[Title of District Court and Cause.]

NOTICE OF APPEAL

(From Judgment and Orders)

Notice is hereby given that the defendant, Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment heretofore entered in this action on December 2, 1948, in Judgment Book 54 at page 322 and from the whole thereof; and also from the order denying said defendant's motion for a new trial herein; and also from the order denying said defendant's motion to dismiss this action on jurisdictional and other grounds.

April 6, 1949.

E. W. MILLER and  
ELON GALUSHA,

By /s/ E. W. MILLER,  
Attorneys for Defendant  
Mrs. Lee Brooks.

[Endorsed]: Filed April 12, 1949. [55]

[Title of District Court and Cause.]

### SUBSTITUTION OF ATTORNEYS

E. W. Miller and Elon G. Galusha are hereby substituted as attorneys for the defendant and appellant for the defendant Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks in the above entitled cause.

April 20, 1949.

/s/ MRS. LEE BROOKS.

I hereby consent to the foregoing substitution of attorneys.

April 20, 1949.

/s/ E. W. MILLER.

I hereby consent to the foregoing substitution of attorneys.

April 20, 1949.

/s/ E. W. MILLER,

/s/ ELON G. GALUSHA.

[Endorsed]: Filed April 22, 1949. [56]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 72, inclusive, contain the orig-

inal Complaint for Restitution and Injunction; Answer; Request for Admissions Under Rule 36; Answer to Request for Admissions Under Rule 36; First Supplemental Answer to Request for Admissions; Objections to Findings of Fact and Conclusions of Law and Judgment; Findings of Fact and Conclusions of Law; Judgment and Decree for Permanent Injunction; Copy of Notice by Clerk of Entry of Judgment; Notice of Motion for New Trial; Substitution of Attorneys; Motion to Dismiss; Separate Affidavits of Mrs. Lee Brooks, E. W. Miller and Edgar G. Wenzlaff re Motion for New Trial; Affidavit of Service by Mail of Motion to Dismiss, etc.; Copy of Letter dated September 15, 1947, from Stuart P. Fischer to Mrs. Harold White; Notice of Appeal; Substitution of Attorneys filed April 22, 1949; Points on Which Appellant Intends to Rely on this Appeal; Request for Preparation of Clerk's Transcript on Appeal; Stipulation and Order Extending Time to File Counter-Designation and Time to File Record and Docket Appeal; Stipulation and Order Extending Time to File Record and Docket on Appeal; Appellee's Designation of Additional Record and Stipulation Amending Appellee's Designation of Additional Record and full, true and correct copies of Minute Orders Entered January 31, 1949; March 3, 1949, and March 14, 1949, which, together with original Plaintiff's Exhibits 1, 4, 2-A and enlargement thereof and Defendant's Exhibit A, transmitted herewith, constitute the record on appeal to the

United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.45, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29th day of June, A.D. 1949.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

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[Endorsed]: No. 12281. United States Court of Appeals for the Ninth Circuit. Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks, Appellant, vs. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 1, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the  
Ninth Circuit

No. 12281

TIGHE E. WOODS, Housing Expediter, Office of  
the Housing Expediter,

Plaintiff and Appellee,

vs.

MRS. LEE BROOKS, Also Known as Mrs. Gwend-  
lyn Brooks,

Defendant and Appellant.

POINTS ON WHICH APPELLANT INTENDS  
TO RELY ON THIS APPEAL

Appellant Intends to Rely Upon the Following  
Points, to wit:

As to Lack of Jurisdiction

1. The District Court erred in assuming jurisdiction because there was at the time of the filing of this action, an action pending on the larger claim, for over-charges, filed by the tenant, White, in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, No. 819627, which was a court of co-ordinate jurisdiction, and the same is still pending.

2. The District Court erred in refusing to dismiss the action on the defendant's Motion to Dismiss and to grant a New Trial when the lack of



jurisdiction was thereby called to the Court's attention.

3. The point of the defense of lack of jurisdiction may be raised at any time and is not waived by a failure to include such defense in the answer, and, therefore, the Court erred in denying defendant's Motion to Dismiss for lack of jurisdiction. The Housing Expediter had no cause of action against this defendant at the time he filed the Federal action because the tenant he represented had already elected to sue in the State Court and that action was then pending.

#### Equitable Action Unfounded

4. The tenant, having elected to sue at law, the Housing Expediter was without right or authority to sue in equity, and seek restitution as an incident thereto.

#### Termination of Act Terminated Action

5. The 1947 Housing and Rent Act as amended in 1948, having expired by its terms on March 31st, 1949, and this action being then pending and undetermined and an appeal having been taken herein by the filing of the Notice of Appeal and Bond on April 12th, 1949, the right of action on which the Judgment herein is based terminated with the act. That said Judgment became devitalized and unenforceable thereby.

## Errors of Law

6. There was no ground or foundation for an equitable action (with restitution as a part of the relief granted) because the tenants had moved out of the property before this action was filed. There was, therefore, no foundation for judgment for damages.

7. The right to recover for the benefit of either tenant was barred by the one year limitation in the Act under which the action was instituted. The action was filed July 23, 1948. Appellant claims that restitution on any violations prior to July 23, 1947, was barred. This barred all of the White claim for \$747.50 for the period June 5, 1944, to March 17, 1947, and all of the Woodfaulk claim from December 11, 1946, to July 23, 1947, for \$103.00, leaving only \$24.00 for the period within the year.

8. The complaint fails to state a cause of action because it is not definitely stated in either of the two causes of action upon which of two Federal Acts it is based; for the allegation in the first cause of action is that it is based upon Section 205C of the Emergency Price Control Act of 1942 as amended and/or Section 206 of the Housing and Rent Act of 1946, as amended; and the same "and/or" allegation appears in the second cause of action. In this kind of an action such an indefinite allegation is wholly insufficient on which to found a judgment.

9. Error in law granting injunction to prevent enforcement of an Order where the reason or occasion for the enforcement had already expired in that the tenant was not longer in possession of the premises.

10. No jurisdiction exists in this case as alleged in the complaint under Section 206 of the Housing and Rental Act of 1947, as amended for the reason that the 1948 Act is not an interpretation of the prior Act or Acts, but is an entirely new Statute.

Dated: July 20, 1949.

E. W. MILLER and  
ELON G. GALUSHA.

By /s/ E. W. MILLER,  
Attorneys for Defendant and  
Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 29, 1949.

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[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD ON  
WHICH APPELLANT RELIES AND TO  
BE PRINTED

The appellant, Mrs. Lee Brooks, also known as Mrs. Gwendlyn Brooks, hereby designates the following portions of the record of the United States

District Court, from which this appeal is taken, to be printed by the Clerk of this Court, to wit:

1. The complaint for restitution and injunction, filed July 23rd, 1948.

2. The answer of the defendant, Mrs. Lee Brooks, omitting Affidavit of Service filed August 10th, 1948.

3. The Findings of Fact and Conclusions of Law, dated December 2nd, 1948, and filed on that date.

4. Objections to Findings of Fact and Conclusions of Law and Judgment of defendant, Mrs. Lee Brooks, filed December 1st, 1948.

5. Judgment and Decree for Permanent Injunction, filed December 2nd, 1948.

6. Notice by Clerk of entering of Judgment, made and filed December 2nd, 1948.

7. Notice of Motion for a new Trial and Affidavit of Service by mail on December 13th, 1948, and filed December 13th, 1948.

8. Substitution of attorneys, E. W. Miller for Edgar G. Wenzlaff, as attorney for defendant, filed December 14th, 1948.

9. Motion to Dismiss, together with exhibits filed therewith, to wit: The Minute Orders of September 11th, 1947, (re Judgment dismissing action) and September 12th, 1947, (re Order Vacating and Setting Aside Judgment dismissing action, showing

that further proceedings in said action would be subject to stipulation of counsel) both in Municipal Court action No. 819627, Municipal Court, City of Los Angeles, County of Los Angeles, State of California, entitled White versus Brooks, et al., and the Affidavits of Edgar G. Wenzlaff, E. W. Miller, and Mrs. Lee Brooks, filed therewith and made a part thereof, all filed for use on Motion to Dismiss and Motion for New Trial, as shown by Affidavit of Service of Motion to Dismiss.

10. Affidavit of Service by Mail of Motion to Dismiss and Supplemental Brief, and further papers on Motion for New Trial, dated February 10, 1949, and filed February 12, 1949.

11. Notice of Appeal, filed April 12th, 1949.

12. Substitution of Attorneys, E. W. Miller and Elon Galusha in place of E. W. Miller alone, filed herein.

13. This Notice to Clerk and Request for preparation of Transcript, to be filed herein.

14. Minute Order, dated January 31st, 1948, No. 8459 PH Civil, recorded in Volume 68, Page 260, Minute Book, Central Division, Order of Judge Hall reading as follows: "For hearing on Motion of defendant for a New Trial, pursuant to Notice thereof, filed December 22nd, 1948; R. G. Solof appearing as counsel for plaintiff; E. G. Wenzlaff, Esq., appearing as counsel for defendant, attorney Wenzlaff makes a statement and attorney Solof makes a statement.



“Court orders that the case as to said Motion stands submitted on briefs to be filed 10 x 5 (Volume 68, Page 260 Minute Book, Central Division.)”

(Correction: E. W. Miller appeared for defendant and not Edgar G. Wenzlaff, whose name is given above in error.)

15. Minute Order dated March 3, 1949, No. 8459 PH Civil, recorded in Volume 68, at Page 695, by Judge Hall, in Minute Book, Central Division, reading as follows:

“On Court’s own Motion, the Order heretofore entered herein submitting defendant’s Motion for a New Trial and Motion to Dismiss is now ordered vacated and set aside and the case re-transferred to the calendar of Judge Cavanah for hearing on March 14, 1949, on defendant’s Motion, said case having heretofore been decided by Judge Cavanah after trial.”

(Correction: The above transfer to Judge Cavanah was not on the Motion of defendant, but apparently on the Court’s own Motion.)

16. Minute Order, dated March 14th, 1949, appearing in Book 69, at Page 146, Minute Book, Central Division, by Judge Cavanah, reading as follows:

“Present Hon. Charles C. Cavanah, District Judge; F. E. Cross, Deputy Clerk; Thos. B. Goodwill, reporter; Woods, etc., vs. Mrs. Lee Brooks, etc., No. 8459, PH Civil.

“For hearing Motion for a New Trial, R. G. Solof, Esq., appearing as counsel for plaintiff, E. W. Miller, Esq., appearing as counsel for defendant,

who is present. Attorney Miller argues for defendant. Attorney Solof makes a statement and argues. The Court makes a statement; Attorney Miller argues further. The Court makes a statement; the Court orders Motion for a New Trial overruled and allows thirty days to appeal."

(Correction: It was on Motion of defendant's counsel that the Court ordered a thirty day stay of execution, instead of allowing thirty days to appeal, as stated in the above Order.)

17. Plaintiff's Exhibits 1, 2-A, and 4, and also the photostatic enlargement of plaintiff's Exhibit 2-a, being the office of Price Administration registration of rental dwellings.

18. The attached statement by appellant of the Points on which defendant intends to rely on this appeal, filed in this Court (omitting the Designation filed in the District Court).

19. The complaint contained in the Municipal Court action File No. 819629, now pending, but not any other portion of the record, for the status of the action is shown by the certified copy of the Minute Orders in that action, and Exhibits to the Affidavits filed in the Motion to Dismiss and for a New Trial.

The Appellant, on this appeal, is not requesting the preparation or use, on the appeal, of the Reporter's Transcript, of any part of the testimony, for

the reason that the above described record is deemed sufficient to present the legal questions to be argued on this appeal.

Dated: This 20th day of July, 1949.

E. W. MILLER and  
ELON G. GALUSHA.

By /s/ E. W. MILLER,  
Attorneys for Defendant and Appellant, Mrs. Lee  
Brooks.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 29, 1949.



IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

---

MRS. LEE BROOKS, also known as Mrs. Gwenlyn Brooks,  
*Appellant,*

*vs.*

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,  
*Appellee.*

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APPELLANT'S BRIEF.

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E. W. MILLER,  
ELON G. GOLUSHA,  
417 South Hill Street, Los Angeles 13,  
*Attorneys for Appellant.*

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No. 12281

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MRS. LEE BROOKS, also known as Mrs. Gwenlyn Brooks,  
*Appellant,*

*vs.*

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

*Appellee.*

---

## APPELLANT'S BRIEF.

---

### Basis of Jurisdiction.

It is appellant's contention that the United States District Court did not have jurisdiction of this case as to the White claim for restitution [Count I of the Complaint, Tr. pp. 2-5 and 8], for the \$797.50 of the \$924.50 sued for; and the grounds for lack of the District Court's jurisdiction are as follows:

(1) The pendency of a California state court action at the time this action was filed. [See Motion to Dismiss, Tr. p. 27.]

(2) The court had no jurisdiction because both tenants had vacated and removed from the premises prior to the filing of this action, and there is no evidence in the record that the landlord rerented or was then receiving rent for the premises. [See Motion to Dismiss, par. 2, Tr. p. 27.]

The appellee attempted to set forth in the complaint facts giving the District Court jurisdiction. [See Complaint, par. II of the First Cause of Action, Tr. p. 3, and par. II of the Second Cause of Action, Tr. p. 6.] Issues were raised by the answer of the appellant. [Tr. pp. 9 and 10.]

The jurisdiction of this Court of Appeals is predicated on a part of Rule 63(a) of the Rules of Civil Procedure for District Courts, reading as follows:

“A party may appeal from a judgment by filing with the District Court a Notice of Appeal.”

The time within which to appeal is governed by Rule 73(a) of the Rules of Civil Procedure for District Courts, that is, the time “commences to run and is to be computed from the entry of . . . an order . . . denying a motion for a new trial.”

The motion for a new trial and the Motion to Dismiss were denied by the District Court on March 14, 1949 [Tr. pp. 55 and 56], and the Court on such denial granted appellant thirty days to appeal.

The notice of appeal was filed April 12, 1949, within said thirty-day period. [Tr. p. 45.]

### Statement of the Case.

This is an appeal from a judgment of the United States District Court entered on December 2, 1948, in favor of the plaintiff, Tighe E. Woods, Housing Expediter, against the defendant and appellant Mrs. Lee Brooks [Tr. p. 45], as landlord.

The appeal is also taken from the order denying said defendant's motion for a new trial [Tr. p. 45] made and entered March 14, 1949. [Tr. p. 55.]



The appeal is also taken from the denial by the Court of defendant's motion to dismiss this action on jurisdictional and other grounds [Tr. p. 45], which motion to dismiss and the grounds thereof appear in the Transcript, pages 26 to 28.

This action was for restitution of money claimed illegally paid through an overcharge for rental and for an injunction, and is in the form of an equitable action authorized by statute (Sec. 205(a) of the Emergency Price Control Act of 1942, as Amended, U. S. C. A. Tit. 50 Appendix, Sec. 901 *et seq.*, or Sec. 206 of the Housing and Rent Act of 1947 as Amended) to be brought by the Housing Expediter. [Tr. pp. 2-6.]

At the time of the commencement of this action on July 23, 1948 [Tr. p. 8], there was still pending in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, an action for treble damages filed by one tenant, Mrs. Harold White, against the defendant and appellant hereunder for treble damages for the same overpayment of rentals as was the subject matter of the restitution alleged in the complaint herein. (See the complaint in the file in the State Municipal Court action, transmitted to this Court for inspection under paragraph 19 of the designation of the parts of the record on which appellant relies. [Tr. p. 56.] That was a legal action under Section 205 of the Emergency Price Control Act of 1942, as amended, and the Act of 1947 (see said complaint in said state file).)

Proof of the pendency of said state action on July 23, 1948, is shown in this record by the Minute Orders in said Municipal Court action, certified copies of which were filed with the Motion to Dismiss this action. [Tr. pp. 28, 29, 30 and 31.] That record shows that the treble dam-

ages action was brought on for trial in the state court and during the course of the trial counsel for plaintiff (the tenant) moved to dismiss, which motion was granted on September 12, 1947; and on the following day the Municipal Court Judge on his own motion, vacated and set aside said judgment, and ordered:

“Further proceedings subject to stipulation of Counsel.” [Tr. p. 29.]

As appears from the affidavit used on the Motion to Dismiss [Tr. p. 28] of Edgar G. Wenzlaff, then attorney for appellant here, no denial of which was made by counter-affidavits on said motion, said Municipal Court action was tried in Division 2 of said State Municipal Court; that the Judge in said action expressed his opinion that the judgment should be for the defendants; whereupon plaintiff there moved to dismiss, and the Court ordered such dismissal. [Tr. p. 39.]

That the next day the Municipal Court Judge, Judge Tyrell, on his own motion, vacated and set aside the order of dismissal and ordered that further proceedings should be subject to stipulation of counsel. That there never was, prior to the date of said affidavit [Feb. 9, 1949], any stipulations of counsel in that action relative to further proceedings [Tr. p. 39], and therefore said action was pending and in full force and undetermined when this action was filed in the District Court on July 23, 1948.

In this equitable action, seeking relief by way of injunction against appellant from demanding or receiving rental in excess of the maximum legal rent in violating the Acts described in the complaint, and in the first cause of action also seeking, as an incident thereto, the amount claimed as over-charges from the defendant to Mrs. Harold White, one of the tenants, in the sum of \$797.50, and

from another tenant, Mrs. Mary Woodfaulk the sum of \$127.00.

The answer of appellant denied receipt of over payments of rent from Mrs. Harold White or from the other tenant.

After a trial judgment went for the Housing Expediter for restitution in the amount sued for in the complaint, less a credit of \$50.00 allowed by the Court; and the seventh paragraph of the judgment enjoins and restrains appellant from receiving rents in excess of the maximum rent under and pursuant to the Housing and Rent Act of 1947 and the regulations thereunder. [Tr. pp. 9, 17, 18, 19 and 20.]

The questions involved in this case and the manner in which they are raised, are briefly stated as follows:

(1) *This Court had no jurisdiction of this case for two reasons:*

(a) A California State Court action was pending at the time this action was filed. (For the facts, see the preceding statement of the case.) See Point I, this brief.

(b) No equitable basis for this Court's jurisdiction existed at the time of the filing of the action and the trial thereof, because the tenants had moved out of the premises before the action was filed [see affidavit of appellant filed with motion to dismiss, Tr. pp. 32 and 33]; and there is no evidence in this case, shown by the record, that appellant re-rented the premises to new tenants, or was receiving any rentals at the time this action in equity for injunction and restitution was filed, on July 23, 1948. (See Point VII, this brief.)

These points are presented by the Motion to Dismiss; supported by the undenied affidavit filed therewith. [Tr. pp. 26-41.]

(2) *The lack of the Court's jurisdiction was not waived by failure to include said defense in the answer.*

This point is made in paragraph III of the points on which appellant intends to rely. [Tr. p. 50.] See Point III of this brief.

(3) *As this action was pending when the 1947-1948 Housing and Rent Acts expired on March 31, 1949, the right to relief in this action died with the 1948 Act; and judgment herein became and is unenforceable by reason thereof.*

This point is raised in paragraph 5 of the points on which appellant intends to rely. [Tr. p. 50.] See Point III of this brief.

(4) *The right to enforce, by an action in equity, the Emergency Price Control Act of 1942 as amended, expired on June 30, 1947, and it was not saved by the saving clause in Section 901(b) of that Act. (U. S. C. (a) Title 50, Sec. 901, as amended.)*

This point is raised in paragraph 10 of the points on which appellant intends to rely, appearing in the Transcript page 52. See Point IV of this brief.

(5) *The complaint fails to state a cause of action because of the uncertainty as to the act or acts relied upon, the pleading being that the first cause of action was based on the 1942 Act "and/or" Section 206 of the Housing and Rent Act of 1947.*

This point is raised in paragraph 8 of the points on which appellant intends to rely, appearing in the Transcript page 51. See Point V of this brief.



(6) *This action for the incidental relief of restitution [Complaint Count I, Tr. pp. 2-5], is barred by the one-year Statute of Limitations.*

This point is raised in paragraph 7 of the points on which appellant intends to rely. [Tr. p. 51.] See Point VI of this brief. It was urged on the Motion to Dismiss. [Tr. p. 38, par. IV.]

(7) *No equitable jurisdiction for this action exists because the tenants had moved out at the time the action was filed. [Tr. p. 32.] The uncontradicted affidavit of appellant was the basis for this point in Motion to Dismiss. [Tr. p. 27, par. II.]*

This point is raised in paragraph 6 (Errors of Law), set forth in the points on which appellant intends to rely. [Tr. p. 51.]

In this connection, it does not appear that appellant as landlord re-rented these premises to new tenants or that she was receiving any rentals from anyone at the time this action was filed. Equitable jurisdiction as a basis for this incidental relief of restitution, did not, therefore, exist. See Point VII of this brief.

The motion to dismiss was first presented to District Judge Pierson M. Hall, and Judge Hall on March 3, 1949, on his own motion, set aside the submission of the motion for a new trial and the motion to dismiss and transferred the two matters to Judge Cavanah for hearing because he had tried the case in the District Court. [Tr. p. 55.] Thereafter, the two matters were heard together before Judge Cavanah and both motions denied. [Tr. pp. 55 and 56.]



## POINT I.

The District Court Had No Jurisdiction of This Equitable Case, When Filed, Because at That Time There Was, and Still Is, Pending in the California State Court, Another Action by the Tenant White for Damages for Overcharges (Which Is the Main Subject Matter of This Action).

The facts relating to this point are set forth in the preliminary statement of the case herein.

Notwithstanding the fact that the complaint herein seeks equitable relief by injunction, it is obvious that restitution of the amount claimed as overcharges for rent is the main subject matter of this action. This appears from an examination of the complaint [Tr. pp. 2-7], that the first cause of action is for restitution of the claimed overcharges and the second cause of action is for an injunction to prevent violations of the Act, although the tenants, alleged to have paid the overcharges, had removed from the premises long prior to the filing of the injunction. [See Tr. p. 32.]

The restitution claimed for the tenant White was \$797.50 and for Woodfaulk \$127.00.

The law is clearly stated in federal cases cited below in this point.

*The rule is that the Court first acquiring jurisdiction retains it.* This rule is concisely stated as follows:

“The general rule is that the authority of the court which first takes control of the subject matter of litigation continues until it has finally and completely dis-

posed of the matter, and no court of coordinate authority is at liberty to interfere with its action (citing many cases).”

*Rosenberg v. Rosenberg*, 85 F. 2d 349.

The rule is also well established that after jurisdiction has been assumed by one Court of coordinate jurisdiction, suit cannot be filed in another Court in regard to the same subject matter.

“After jurisdiction has been assumed by one court of coordinate jurisdiction, the parties to the suit may not thereafter be permitted to maintain a suit for the same relief in another court of coordinate jurisdiction. It would, of course, be highly illogical and result in diverse decisions to countenance such procedure.”

*Gregg v. Winchester* (9th Cir.), 173 F. 2d 512  
(Opinion by Stephens, C. J.).

To the same effect is:

*Gillis v. Keystone Mutual Casualty Co.* (6th Cir.),  
172 F. 2d 826.

Another statement of the same principle is:

“Where the jurisdiction of the State court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res to defeat or impair* the state court’s jurisdiction.”

*First National Bank & Trust Co. v. Skokie* (7th Cir.), 173 Fed. Rep. 1, 4, citing,

*Kline v. Burke Construction Co.* 260 U. S. 226,  
229, 67 L. Ed. 226.

## POINT II.

### Objection to Lack of Jurisdiction Is Not Waived by Failure to Include Such Defense in the Answer.

Point I of this brief was one of the points [Point I, Tr. p. 27] raised and presented on the Motion to Dismiss this action in the District Court.

Although this point was not raised in the answer in this case, nor presented at the trial, it was urged on the motion to dismiss, argued at the same time as the action for a new trial.

This point of jurisdiction is available to the defendant at any time and it was not waived by a failure to present, prior to the time of the filing and arguing of the motion to dismiss.

This point has been decided in a federal case wherein the Court said:

“The defense of lack of jurisdiction of the subject matter is not waived by failure to include such defense in the answer; but the defense may be raised by motion to dismiss after answer.”

*Union Nat'l. Bank et al. v. McDonald*, 36 Fed. Sup. 46, citing,

Federal Rules of Civil Procedure for District Court, 12(b), 28 U. S. C. A. following Section 723(c).

### POINT III.

**The Court Had No Jurisdiction to Grant the Expediter Any Relief Because the 1942, 1947 and 1948 Acts All Expired by Their Terms on or Prior to April 1, 1949; and All Rights to Recover on Overcharges Expired Therewith.**

The general rule in support of this point has been briefly stated, as follows:

“When an Act has thus expired . . . in the absence of a savings clause, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after.”

*Mo. Pacific R. Co. v. U. S.*, 16 Fed. Sup. 752, 760,  
citing,

*S. C. v. Gaillard*, 101 U. S. 433, 438, 25 L. Ed. 937.

There is no savings clause in the 1947 and 1948 Housing and Rent Acts which can serve to preserve this cause of action after their expiration.

The Savings Clause in the 1942 Emergency Price Control Act (U. S. C. A. Tit. 50, Sec. 901b) following the statement that the Act should terminate on June 30, 1945, reads as follows:

“Except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act, and such Regulations . . . , shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense.”

This Savings Clause does not apply to an action in equity to enforce the provisions of this Act; and any equitable suit for injunction or enforcement by way of restitution, because such action is not within the meaning of such Savings Clause.

This point is definitely decided, in principle, in the following case:

*Talbot v. Woods*, 164 Fed. Sup. 2d 493.

It is also decided in a case directly in point on this subject:

*Woods v. Gochmour*, 81 Fed. Sup. 457 (quoted from at length in Point VI of this brief).

#### POINT IV.

**The District Court Had No Jurisdiction of This Act Filed July 23, 1948, Because the 1942 Act, as Amended, Had Expired by Its Terms Prior Thereto.**

The arguments and authorities cited in Point III apply equally to this point especially the principles decided in the case of:

*Woods v. Gochmour*, 81 Fed. Sup. 457,

quoted in Point VI on the subject of the Statute of Limitations are applicable to this point and show that the District Court should have granted the appellant's motion to dismiss this action on the ground of jurisdiction.



## POINT V.

**The Complaint Fails to State a Cause of Action, in That It Fails to Show With Certainty Upon Which Federal Act It Was Founded.**

The complaint, in the form in which it is worded, fails to state a cause of action.

Paragraph II of the First Cause of Action, reads:

“Jurisdiction of this cause of action is conferred upon this Court by Sections 205(c) of the Emergency Price Control Act of 1942, as amended, and/or Section 206 of the Housing and Rent Act of 1947, as amended.” [Tr. p. 3.]

The same “and/or” character is contained in paragraph II of the Second Cause of Action leaving it uncertain whether the plaintiff is proceeding under a violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, or Section 206(a) of the Housing and Rent Act of 1947, as amended. [Tr. p. 5.]

Again, in the same paragraph, it is uncertain whether the violation is of Section 2(b) of the Emergency Price Control Act of 1942, or the Controlled Housing Rent Regulations in the 1947 Act. [Tr. pp. 5 and 6.]

These statutes are to enforce penalties for overcharges of rent.

*There is no way for the Court or defendant to determine whether the Expediter intends to plead a violation of one statute or another.* This is because of the use of the phrase “and/or.”

In a discussion, in the California Supreme Court, in the case of

*In re Bell*, 19 Cal. 2d 488, 122 P. 2d 22,

it is shown that such pleading has been condemned by many courts and is open to objection.

In that case the California Supreme Court said:

“The expression ‘and/or,’ which made possible a conviction couched in such general terms, has met with widespread condemnation. (Citing many cases from various statutes.)

“It is true that the expression has proved convenient in contracts and other instruments where, by its intentional equivocation, it can anticipate alternative possibilities without the cumbersome itemization of each one. (118 A. L. R. 1367; 43 Yale L. J. 918, 20 Marquette L. Rev. 101.). It lends itself, however, as much to ambiguity as to brevity. Thus it cannot intelligibly be used to fix the occurrence of past events. . . .

“A comparable lack of precision was censured by the United States Supreme Court in *Stromberg v. California*, 283 U. S. 359, 368 (51 S. Ct. 532, 75 L. Ed. 1117, 73 A. L. R. 1484). . . .

“It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld. . . .

“The ambiguity of the judgment in the present case would thus clearly warrant a reversal of the conviction on appeal or other direct attack.”

Under the principle of the foregoing authorities, this judgment should be reversed for the reason that the complaint fails to state a cause of action.

## POINT VI.

### This Action Was Barred by the One-Year Statute of Limitations.

The facts relative to the Statute of Limitations in this case are as follows:

The action was filed on July 23, 1948. [Tr. p. 8.]

The overcharge for which damages or restitution is sought were alleged to have been collected prior to the expiration of the 1942 Act, on June 30, 1947, except for the period July 1, 1947, up to and including September 13, 1947, on the smaller claim, or a period of eleven weeks which at \$4.50 per week in the Woodfaulk claim would entitle the Expediter to \$49.50 on that behalf.

Applying the one-year Statute of Limitations to this action, the alleged claims for overcharges collected prior to July 23, 1947, would be barred.

On this basis, all of the alleged overcharges on the White tenancy accrued prior to April 22, 1947, and the whole of this claim would be barred.

On this basis the greater part of the Woodfaulk claim, that is, all except seven weeks at of \$4.50 per week, or \$31.50 on this claim would be barred.

## THE LAW.

There is no question but what the whole of the White claim for overcharges and all but a few weeks of the Woodfaulk claim were barred in any action under the statute for treble damages. This point is decided in

*Sampson v. Thomas*, 76 Fed. Supp. 691, 693, 694.

Under the principles set forth in the following case, the equitable action, having as an incident thereto, restitution of overcharges, was also barred.

*Woods v. Goochnour*, 81 Fed. Supp. 457.

This is a decision of the District Court, but we find no appeal therefrom and we rely upon the principles therein stated.

That action was filed, as was the present case, in July, 1948. All overcharges claimed were collected prior to the termination of the 1942 Act on which it was based *June 30, 1947*.

The Court pointed out that the complaint was filed July 12, 1948, for overcharges between the periods April 1, 1947, and June 30, 1947. That it was an equitable action in which plaintiff sought to sustain the jurisdiction on the ground that the Court had jurisdiction in the equity action to also grant the *additional relief of restitution of overcharges*, relying upon two cases cited and relied upon the expediter in this case, namely, *Porter v. Warner Holding Co.*, 328 U. S. 395.

*Creedon v. Randolph*, 165 F. 2d 918.

The expediter there relied upon the savings clause in the 1942 Act (50 U. S. C. A. Appendix, Section 901(b)). The plaintiff claimed he was suing under Section 205(a) (as in the present case) and not under Section 205(e), which the expediter there admitted was barred.

The Court said:

“The crucial question, in the present case however is whether there is any basis for the exercise of equitable jurisdiction at all under Section 205(a) in an action brought after the termination of the Act.” (June 30, 1947.)

The Court, on this point held:

“In each of the cited cases the action was commenced and disposed of in the Trial Court before the termination of the Price Controlling Act. In the instant case, however, the Act had expired before the complaint was filed. The savings clause, which authorizes any proper suit to enforce rights or liabilities incurred prior to termination, could not then cover suits in equity, Sec. 205(a), either to enjoin future violations of the Act or to enforce compliance with the Act for the obvious reason that the Act had ceased to exist. Since equitable jurisdiction to enter an injunction decree or compliance order had died with the Act, the incidental and dependent power to order restitution, likewise, had expired.”

The plaintiff argues that Congress had power to order restitution of rental overcharge under the old Act of 1942 in the enforcement of the new one of 1947. The Court held this error, saying:

“The Housing and Rent Act, is not in any sense an extension or continuation of the Price Control Act, but a wholly new and independent Statute. It is narrower in scope, does not have the same sanctions for enforcement, and differs in other respects, which I shall not detail here from the Price Control Act.

“The powers of this court to order restitution of overcharges under an expired Statute cannot be derived from the desirability of aiding in the enforcement of some other and different Statute.



“I find no justification for such an extraordinary extension of the equity powers of the court in the provisions of either the old or the new Act.

“The motion to dismiss the first cause of action of plaintiff’s complaint will be granted.”

This question of the Statute of Limitations was affected by the fact that the purported retroactive Order made by the Expediter on June 30, 1947, attempted to have it take effect back on June 5, 1944, was void. If held void by this Court, then the White claim for restitution and all but a few weeks of the other claim fails.

Plaintiff’s Exhibit 2A, the Registration Certificate, was transmitted to this Court as a part of the record on appeal, as is also the enlargement thereof under paragraph 17 of the designation of papers, and records on appeal [Tr. p. 56], showing that appellant, the landlord, filed said registration certificate on June 4, 1947; that it was received for editing on June 5, 1947, and was reviewed on June 9, 1947, and entered in the Examination Department on June 19, 1947.

Plaintiff’s Exhibit 2A also shows that there was a purported order dated June 30, 1947, attempting to become effective retroactively, from June 5, 1944, changing the rental from \$15.50 per week to \$10.00 per week. This registration certificate, plaintiff’s Exhibit 2A and the enlargement shows clearly on its face that there was a change by someone from the figure Section 3, paragraph 3, of \$7.50 to \$15.50. An attempted overcharge can be

recovered upon only upon the basis of this alleged retro-active order which would make the overpayment \$5.50 per week. [Tr. p. 8.]

Uncontradicted facts in this case are set forth in the affidavit of appellant filed with the Motion to Dismiss that upon receipt of a notice to register the housing accommodations she went, within a very short time after June 4, 1947, to the Office of Price Administration and registered the White tenancy at \$7.50 per week and the Woodfaulk tenancy at \$4.50 per week. [Tr. p. 33.] Said uncontradicted affidavit further shows that subsequent to June 4, 1947, appellant never received either personal service or service by registered mail or otherwise, from the Office of Price Administration of a notice of an intended change in the amount of her registration of the maximum amount of rent payable on the White unit and that she had no knowledge of the change from \$7.50 per week to \$15.50, or from \$15.50 to \$10.00 per week. There is no evidence in the case nor is there any in this record that any such notice of intended change in the maximum amount of rent was ever served upon appellant or sent to her by registered mail. Attorney Edgar E. Menzlaff, who tried this action in the District Court, states in his uncontradicted affidavit that no testimony was ever introduced at the trial of this action that there was any service upon appellant by the Office of Price Administration, by registered mail or otherwise, of a notice of any intended change in the amount of the maximum rental under such registration. [Tr. pp. 40-41.]

## THE LAW RELATIVE TO THE RETROACTIVE ORDER.

The purported retroactive order appears on the back of Plaintiff's Exhibit 2A changing the alleged legal rent from \$15.50 to \$10.00 effective from June 5, 1944, was void because there was no notice given as provided by Section 1300.207 from document 59148 known as Procedural Regulations "3" from which we quote as follows:

"Action by rent director on his own initiative. In any case where the rent director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter the order on his own initiative, he shall before taking such action serve a notice upon the landlord of the housing accommodation involved stating the proposed action and the grounds therefor. This proceeding shall be deemed commencing on the date of issuance of such notice."

And there was no compliance with the provisions of Sec. 1300.362 relative to service of papers, reading as follows:

"*Service of papers.* Notices, orders and other process and papers may be served personally or by leaving a copy thereof at the residence or principal place of business of the person to be served, or by mail, or by telegraph. When service is by registered mail or telegraph the return post office receipt or telegraph receipt shall be proof of service. When service is by unregistered mail an affidavit of service that the document has been mailed shall be proof of service."

The effect of invalidity of this purported retroactive order is that in the absence of a valid order for a retroactive change in the maximum amount of rent, the one year statute applies from the time of the actual violation and cannot be held affected by any other rule.

POINT VII.

There Was No Equitable Ground for This Action, Because Both Tenants Had Moved Out of the Property Before This Action Was Filed; and, Therefore, No Basis for the Incidental Relief of Damages for Overcharges.

There were two defendants, as shown by the table to the complaint. [Tr. p. 8.] Mrs. Harold White was sued for the larger amount of overcharge, and, as to her the complaint charged overcharges up to April 22, 1947. [Tr. p. 8.]

According to appellant's affidavit, Mrs. Harold White vacated the premises April 21, 1947, and she did not occupy the same thereafter. [Tr. p. 32.]

It was charged in the complaint that Mrs. Woodfaulk overpaid rental to and including September 13, 1947, and the Court found in accordance therewith. [Tr. p. 14.] Then, a short time thereafter, to-wit: On October 15, 1947, Mrs. Woodfaulk vacated the premises. [Tr. p. 32.] It further appeared that neither tenant was in this property at the time of the filing of this action on July 27, 1948. For this reason there was no equitable basis for the action of restraining appellant from continuing to collect overcharges from them or anyone else.

There was no showing in the complaint or in the evidence that the premises were rented again to any tenant. The complaint merely alleges a collection of excess rentals according to the schedule attached to the complaint and the latest date or any occupancy shown by any tenant was September 13, 1947.

The rule applied in other jurisdictions, and there is no reason why it should not be applied here, that this form of equitable action for injunctive relief does not lie in



favor of tenant who has moved out of the properties before the complaint is filed.

In the District Court it was held:

"The plaintiffs, Leroy W. Paxton and Julia A. Paxton, who formerly occupied the premises 244 North Franklin Street, vacated those premises on September 23, 1947. Therefore, no party is presently before the court who has standing to seek injunctive relief with respect to those premises."

*Paxton v. Smock*, 73 Fed. Supp. 793.

The principles involved in this point are discussed in the case of

*Woods v. Kooker*, D. C. W. D. Ark (April, 1949),  
83 Fed. Supp. 362, 364.

In discussing equitable relief of this kind the Court said:

"The historic injunction process was designed to deter, not to punish (p. 364)."

In denying an injunction and any equitable relief under the facts there, the Court said:

"The Defendant has long since sold the property involved and does not now own any property for which he receives rent. He is in no sense a professional landlord, and an injunction under these facts would accomplish no useful purpose."

No authorities are necessary on the point that an injunction should not and cannot be granted to restrain where there is nothing to restrain, and this fact shows that the only purpose of this suit was the restitution, for this was the first count in the complaint and the only thing really accomplished by the judgment.



For the foregoing reasons, it is respectfully submitted that the order denying the motion to dismiss should be reversed and the case dismissed, or if not dismissed, then a new trial should be granted.

Respectfully submitted,

E. W. MILLER,

ELON G. GOLUSHA,

*Attorneys for Appellant.*



No. 12281

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**MRS. LEE BROOKS, ALSO KNOWN AS MRS. GWENLYN  
BROOKS, APPELLANT**

*vs.*

**RICHARD E. WOODS, HOUSING EXPEDITER, OFFICE OF THE  
HOUSING EXPEDITER, APPELLEE**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

---

**APPELLEE'S BRIEF**

---

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**FILED**

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**W. P. O'DRISCOLL**



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# **In the United States Court of Appeals for the Ninth Circuit**

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No. 12281

**MRS. LEE BROOKS, ALSO KNOWN AS MRS. GWENLYN  
BROOKS, APPELLANT**

*vs.*

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE  
HOUSING EXPEDITER, APPELLEE**

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

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## **BRIEF OF APPELLEE**

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### **JURISDICTION**

Defendant-appellant <sup>1</sup> appeals from a final judgment awarding restitution of rent overcharges to tenants and injunctive relief in an action brought by the Housing Expediter <sup>2</sup> pursuant to Sections 205 (a) and (c) of the Emergency Price Control Act of 1942, as amended <sup>3</sup> (50 U. S. C. App., Sections 925 (a) and (c)) and Section 206 of the Housing and Rent Act

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<sup>1</sup> Hereinafter referred to as the "appellant."

<sup>2</sup> Hereinafter referred to as the "appellee."

<sup>3</sup> The Emergency Price Control Act of 1942, as amended, is hereinafter called the "Act of 1942."

of 1947, as amended by Public Law 464, 80th Congress, 2d Session <sup>4</sup> (50 U. S. C., App. Sec. 1896).

Judgment was entered on December 2, 1948 (R. 21). Notice of appeal was filed on April 12, 1949 (R. 45) following the denial on March 14, 1949 (R. 44) of defendant's motion for a new trial filed on December 13, 1948 (R. 24). Jurisdiction of the district court was under Sections 205 (a) and (c) of the Price Control Act and Section 206 of the 1947 Rent Act, and jurisdiction of this Court is pursuant to Section 1291 of the Judiciary and Judicial Code (28 U. S. C. A. 1291).

#### STATEMENT OF THE CASE

The material facts in this case are the following:

The appellant, Mrs. Lee Brooks, was the landlord of housing accommodations located at 1742 West 36th Street, Los Angeles, California (R. 12, 13). The accommodations were situated within the Los Angeles Defense Rental Area, and were subject to the provisions of the Rent Regulation for Housing,<sup>5</sup> issued pursuant to the Act of 1942, and the Controlled Housing Rent Regulation,<sup>6</sup> issued pursuant to the 1947 Rent Act (R. 13). These controlled housing units of the appellant involved in the present action can best be identified by the names of their respective tenants, namely, Mrs. Harold White and Mrs. Mary

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<sup>4</sup> The Housing and Rent Act of 1947, as amended, is hereinafter called the "1947 Rent Act."

<sup>5</sup> 10 F. R. 13258.

<sup>6</sup> 12 F. R. 4331.



Woodfaulk.<sup>7</sup> Under the Rent Regulations, the applicable maximum rents established for the appellant's housing accommodations were \$10.00 per week for the White apartment<sup>8</sup> and \$4.50 per week for the Woodfaulk apartment (Finding 7, R. 13-14). During the period from June 5, 1944 to March 17, 1947, the appellant exceeded the maximum rent of \$10.00 per week for the White apartment by receiving a rental of \$15.50 per week, at a total overcharge of \$747.50 (Finding 7, R. 14). The appellant exceeded the maximum rent of \$4.50 per week for the Woodfaulk apartment by receiving a weekly rental of \$8.50 from December 11, 1946 to May 17, 1947, and \$7.50 from May 17, 1947 to September 13, 1947 (Finding 7, R. 14). The total overcharges made by the appellant in the renting of the Woodfaulk apartment amounted to \$127.00 (R. 14).

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<sup>7</sup> The subject housing units are hereinafter referred to as the "White Apartment" and the "Woodfaulk Apartment," respectively.

<sup>8</sup> The appellant in effect challenges the correctness of the trial court's finding that the maximum rent was \$10.00 per week by contending in her brief (p. 20, Appellant's Br.), the Rent Director's order establishing the maximum rent was void. This order (which is not reproduced in the printed record) is described in Appellant's Brief (at p. 18), as dated June 30, 1947, and changing the maximum rent from \$15.50 per week to \$10.00 per week, effective from June 5, 1944. The Rent Director issued an order of this description pursuant to Sections 4 (e) and 5 (c) (1) of the Rent Regulation for Housing (*infra*, p. 48), issued under the Act of 1942, where a landlord filed a late registration for premises initially rented at a rate in excess of the rental generally prevailing for comparable accommodations in the same area. This point will be discussed more fully hereafter at pp. 29-30.

The complaint of the Housing Expediter was filed in the District Court on July 23, 1948 (R. 8), and charged that the defendant received rentals from tenants in excess of the maximum rents established by the Rent Regulations issued under the Act of 1942 and the 1947 Rent Act (See Par. VII of complaint, R. 4-5, and Par. III of complaint, R. 3-4). A Schedule (R. 8), attached to and made a part of Par. VII of the complaint (R. 5), specified the alleged facts with reference to the claimed overcharges, and indicated periods of overcharges during the time when the Act of 1942 was in force and also during the existence of the 1947 Rent Act.<sup>9</sup>

The prayer of the complaint was for restitution of the overcharges to the tenants and injunctive relief against further violations of the maximum rents prescribed by the regulations issued pursuant to the 1947 Rent Act (R. 6, 7). The Answer (R. 9) filed by appellant denied the allegations of the complaint as to the maximum rents, the collection of rents in the amounts and for the periods alleged, and the making of overcharges in the amounts alleged (R. 4). This case came on for trial before the District Court on November 19 and 20, 1948, the Honorable Judge Charles C. Cavanah presiding, without a jury (R. 17). After the introduction of both oral and documentary evidence (R. 12), the Court below made fact findings, *inter alia*, that the Housing Expediter was authorized to bring this action under the Act of 1942 and the 1947 Rent Act; that Mrs. Lee Brooks, as landlord of

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<sup>9</sup> The Act of 1942 terminated June 30, 1947; the 1947 Rent Act became effective July 1, 1947.

the White apartment and the Woodfaulk apartment had received overcharges by charging more than the applicable maximum rents which were \$10.00 per week and \$4.50 per week for the White and Woodfaulk apartments respectively (R. 13-14). The Court ruled (Conclusions of Law 2, R. 15) that the appellant had violated Section 2 (a) of the Rent Regulation for Housing (*infra*, p. 48) and the Act of 1942, and Section 2 (a) of the Controlled Housing Regulations (*infra*, p. 50), and the 1947 Rent Act. Accordingly, the Court held that the plaintiff was entitled to an order requiring the appellant to refund the rental overcharges to the tenants and to a permanent injunction against violations of the 1947 Rent Act and the maximum rents established by the Rent Regulation thereunder (R. 15). Judgment for the amount of the overcharges in favor of the Housing Expediter for the benefit of the tenants and decree for permanent injunction was entered on December 2, 1948 (R. 17-20).

On December 13, 1949, appellant filed a motion for a new trial, asserting error on the part of the trial court in ruling that the validity of the Order<sup>10</sup> of the Rent Director could not be attacked (R. 22). Appellant also urged that the decision in the case was contrary to the evidence, and that the evidence was insufficient to justify the decision (R. 22-23).

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<sup>10</sup> Apparently the appellant was referring to the order described in Appellant's Brief at pages 18 and 20 which fixed the maximum rent for the White apartment at \$10.00 per week, effective from June 5, 1944.

On February 9, 1949, appellant filed a "Motion to Dismiss" the present action, contending that the District Court lacked jurisdiction because the tenant White had filed an action against the appellant based on "the principal cause of this action herein" in the Municipal Court of Los Angeles on July 30, 1947; that jurisdiction was lacking because the tenants had moved prior to filing of the present suit; that the present action was "penal" and the allegations of the complaint for the "penal" action were indefinite as to the statutes allegedly violated because of the use of "and/or", thereby failing to "state facts sufficient to constitute a cause of action herein"; that the plaintiff's suit was barred by the one-year statute of limitations (R. 26-27). The lower court overruled the appellant's motion (R. 44), and notice of appeal from the judgment and from the orders denying the motions for new trial and to dismiss the action, was filed (R. 45).

The Appellant urges a host of contentions for reversing the judgment below (R. 52). These may be summarized as follows:

1. The District Court erred in assuming jurisdiction because the tenant, Mrs. White, had filed an action for overcharges in the Municipal Court of Los Angeles which was pending in the "court of co-ordinate jurisdiction" when the present action was instituted, and is still pending.

2. The District Court erred in refusing to dismiss the action on appellant's motions to dismiss and grant a new trial when the action instituted in the



Municipal Court by the tenant White prior to the present suit was called to the court's attention after judgment herein.

3. "The Housing Expediter had no cause of action because the tenant White had already sued in the State Court."

4. Since the tenant White had sued at law, the Housing Expediter was without authority to sue in equity.

5. The judgment in the present action is unenforceable because "the right of action in which the Judgment herein is based terminated" with the expiration of the 1947 Rent Act "on March 31st, 1949".

6. There was no ground for an equitable action seeking restitution because the tenants vacated appellant's premises before the present action was filed.

7. The right to recover for the benefit of either tenant was barred by a one-year limitation in the law under which the present action was instituted.

8. The complaint fails to state a cause of action because, as a result of the use of "and/or" in allegations, it is not definitely stated upon which of the Federal Acts the action is based.

9. The Court below erred in granting an injunction after the tenants had moved from the appellant's premises.

10. Jurisdiction is lacking under the 1947 Rent Act "for the reason that the 1948 Act is not an interpretation of the prior Act or Acts, but is an entirely new statute".

These contentions will be considered in the order which they appear in Appellant's Brief.



## SUMMARY OF ARGUMENT

(1) The present suit in equity by the Housing Expediter for restitution of overcharges and injunction seeks entirely different relief in a separate cause of action from the statutory damage action at law instituted by a tenant under another and independent section of the Act of 1942. Therefore, the principle of comity is not applicable and the District Court properly exercised jurisdiction in this case.

(2) The Court below was right in rejecting the contention of the appellant that the Court lacked jurisdiction. Filing of the statutory damage action in the State Court by a single tenant did not divest the Court below of jurisdiction over this separate action for equitable relief by the Housing Expediter based on overcharges to two tenants.

(3) The commencement of a suit at law by a tenant did not deprive the Expediter of authority to bring an equitable action. Applicable provisions of the Act of 1942 and the 1947 Rent Act support the conclusion that compliance actions by the Housing Expediter are not precluded by the filing of the tenant's action at law.

(4) There is no merit to the contention that the judgment in the present action is unenforceable. The 1947 Rent Act did not terminate on March 31, 1948, but was extended to June 30, 1950 by enactment of Section 203 (g) of the Housing and Rent Act of 1949. The General Savings Provision of the Federal Code preserves causes of action for violations under the 1947 Rent Act, and the savings provision of Section 1 (b) of the Act of 1942 sustains the action

herein insofar as concerns overcharges under the latter Act.

(5) The vacating of appellant's apartments by the tenants does not preclude an award of restitution. This relief serves to promote the legislative policy of preventing inflation and also to obtain compliance with the Acts.

(6) The one-year limitation on statutory damage actions has no application to suits for restitution under either the Act of 1942 or the 1947 Rent Act. Appellant's contention that the Rent Director's order was invalid disregards the established principle that a District Court has no jurisdiction to consider objections to the validity of an order issued under the Act of 1942, and that this is a matter committed by Section 204 (d) of the Act to the exclusive jurisdiction of the Emergency Court of Appeals.

(7) There is no merit to the contention that the complaint failed to state a cause of action. The complaint, construed as a whole, clearly alleged violations of the Act of 1942 and the 1947 Rent Act. Further, the trial court granted the relief to which the plaintiff was entitled, based upon the proof present in the case. In the absence of any showing to the contrary, findings of fact are presumed to be supported by the evidence. In no event are the findings so clearly erroneous that they should be disturbed.

(8) The tenant's removal from appellant's accommodations did not render injunctive relief moot in this case. The issue as to whether future violations should be enjoined was still before the trial court. Also, that Court continued to have jurisdiction under

the 1947 Act to enjoin the appellant because such Act was in effect when the decree was entered. The Court below had jurisdiction to enter the judgment and decree; the judgment was right in all respects and it should be affirmed.

## ARGUMENT OF THE CASE

### I

There is no merit to the contention that the District Court lacked jurisdiction of the Housing Expediter's suit for equitable relief of restitution and injunction because an action for statutory damages filed by a tenant in the California State court was pending

The appellant contends that the court below "had no jurisdiction" (Brief, p. 8) of the present action because there is pending in the California State Court a prior action brought by one of the tenants concerned to recover for rent overcharges received by the appellant. There is no merit to this contention for two reasons. First, the courts have limited the application of the rule of comity to actions of an *in rem* or *quasi in rem* nature. In such cases, as the Sixth Circuit Court stated in *Gillis v. Keystone Mut. Casualty Co.*, 172 F. 2d 826 (at p. 829):

\* \* \* the court first assuming jurisdiction over the *res* involved may exercise that jurisdiction to the exclusion of the other.

And, in *Butler v. Judge of United States District Court, Etc.*, 116 F. 2d 1013, this court observed (at p. 1015):

The pendency of the same cause of action in a state court between the same parties is ordi-

narily not a ground for abating the action in the federal court.

See also, *Mandeville v. Canterbury*, 318 U. S. 47, where the Supreme Court stated the principle followed by that court is that the rule of comity does not apply "where the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant."

Second, for the rule of comity to apply, there must be present in each action identity of the parties, issues, and relief requested. When these prerequisites are present in both the action filed in a federal court and in an action previously started in a state court, the rule of comity requires dismissal of the complaint by the federal court. This is the principle set forth in the cases relied on by appellant. For example, in *Gregg v. Winchester*, 173 F. 2d 512, cited by appellant, this court ruled that the Federal District Court should have declined to take jurisdiction in view of the pendency of an action in the State Court, and emphasized (at p. 512):

The complaint [in the State Court] is practically a duplicate of the one in our case. The issues are the same; the relief asked for is the same; the members of the class similarly situated include the named plaintiffs of the federal action; and the attorneys are the same.

But this principle has no application here since none of the conditions for invoking the rule of comity, as set forth by this court in *Gregg v. Winchester*, *supra*, are present in the case at bar. Neither the parties nor the issues are the same, nor is the action



of the same kind in both courts. The action of a tenant in the State Court is brought pursuant to Section 205 (e) of the Act of 1942 (*infra*, p. 40), whereas the present suit of the Housing Expediter is authorized by Section 205 (a) of the same Act (*infra*, p. 39). The most obvious difference between these two actions is that the plaintiffs therein are not the same party. The action under Section 205 (e) of the Act of 1942 is commenced by the tenant as the plaintiff, but the action under Section 205 (e) is instituted by the Housing Expediter.<sup>11</sup> That the tenant is not a necessary party to the suit by the Housing Expediter under Section 205 (a) of the Act is evident from the holding of the Supreme Court in *Porter v. Warner Holding Co.*, 328 U. S. 395, that tenants could be brought in as "interested parties" where necessary to settle their conflicting claims with landlords when a District Court has decided to award restitution in an action by the Administrator [Expediter].

Another plain distinction is that the action of the tenant under Section 205 (e) seeks the relief of statutory damages but the present action under Section 205 (a) requested equitable relief of restitution of the rent overcharges (R. 6). In addition, an injunction against future violations of maximum rents was asked pursuant to Section 206 of the Act of 1947 (*infra*, p. 47) (R. 5, 6). A further point of difference is the absence of an identity of issues. In

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<sup>11</sup> The Housing Expediter sues as successor to the Price Administrator who was the official designated in Section 205 (a) of the Act of 1942 (*infra*, p. 39) to bring the suit thereunder.



the instant suit by the Expediter under Section 205 (a) of the Act of 1942, the District Court was called upon in the exercise of its equitable discretion, "to consider whether a restitution order was necessary or proper under the circumstances here present." *Porter v. Warner Holding Co.*, 328 U. S. at p. 403. But in the action for statutory damages, under Section 205 (e), the court is obliged to award at least the amount of overcharges to the plaintiff, where the violation is established. *Fontes v. Porter*, 156 F. 2d 956, 957 (C. A. 9th); *Bowles v. Franceschini*, 145 F. 2d 510, 514 (C. A. 1st). Defenses which may be considered are also different in both suits. In an action under Section 205 (e), the defendant may plead the "partial defense" of "lack of willfulness, coupled with the taking of practicable precautions against the occurrence of a violation" which "operates only to reduce damages to the amount of the overcharge." (*Fontes v. Porter, supra* at p. 960.) In sharp contrast, Section 205 (a) of the Act of 1942 (*infra*, p. 39) makes no provision for the introduction of this issue of mitigation of the amount of the defendant's liability. "It is not necessary that a landlord be at fault in order for it to be equitable to require him to restore that which he has illegally received." *Woods v. McCord*, 175 F. 2d 919, 922 (C. A. 9th).

In *Porter v. Warner Holding Company, supra*, the Supreme Court marked out the lines of essential difference between the cause of action under Section 205 (a) of the Act of 1942 and one under section

205 (e) in the following language (328 U. S. at p. 402):

When the Administrator seeks restitution under § 205 (a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205 (e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. Thus it is plainly unaffected by the provisions of § 205 (e).

In *Woods v. Witzke*, 174 F. 2d 855, 857 (C. A. 6th), which was an action by the Housing Expediter against a landlord, the Court found the cause of action under 205 (e) of the Act of 1942 to be so different in its nature from the cause of action under Section 205 (a) that the Court directed relief under both these sections be granted by the District Court. In ordering that judgment be entered under Sections 205 (a) and (e) of the Act, the Sixth Circuit Court stated (at p. 857):

\* \* \* there is no incongruity between the award of statutory damages and restitution. The one is a penalty for violation of the statute and the rent control regulation, and the other is an award for the benefit of the tenant.

Likewise, in *Cobleigh v. Woods*, 172 F. 2d 167 (C. A. 1st), the Court, while declining to approve recovery for more than twice the rent overcharges,

nevertheless ruled that the Housing Expediter was authorized under the Act of 1942 to "join in a single complaint requests for appropriate relief under both Section 205 (a) and Section 205 (e)," thus permitting recovery of double the overcharges by way of statutory damages and also the amount of the overcharges in the form of restitution to the tenants (172 F. 2d at p. 170).

The action of the tenant for recovery of statutory damages involves such a different cause of action from that involved in the suit of the Housing Expediter for injunctive relief under Section 205 (a), that relief under one claim will not bar recovery in a suit brought at a subsequent time upon the other claim. This was pointed out by the Court in *Woodbury v. Porter*, 158 F. 2d 194 (C. A. 8th). In affirming the ruling of the District Court that the issuance of a final injunction against a landlord under the Act of 1942 did not bar a subsequent action for treble damages under Section 205 (e) of the statute, the Appellate Court noted (158 F. 2d at pp. 194-195):

The pleadings in the action for damages would be wholly inadequate as a basis for an injunction. To sustain an action for injunction it would be necessary to plead and prove threatened violations of the act and it has been held that if it is clear that violations will not be repeated, an injunction cannot be obtained as the purpose of an injunction is to prevent continued wrongful acts rather than to redress past grievances. *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930.

No such pleading nor proof would be essential in the action to recover damages.

\* \* \* \* \*

The injunctional relief is for protection from future violations, while the action for damages is the remedy afforded for violations that have already taken place. We are clear that the judgment enjoining the defendant from further violations of the Act did not constitute a bar to the subsequent action for damages.

See also *Fleming v. Goodwin*, 165 F. 2d 334, 336 (C. A. 8th).

Thus, the vital differences shown above between the tenant's action in the state court and the present suit of the Housing Expediter clearly preclude the application of the rule of comity to defeat the jurisdiction of the lower court. The cases cited at pages 8 and 9 of Appellant's Brief do not sustain her contention and have no relevancy to the precise question involved here.

## II

**The court below was right in rejecting the contention of the appellant that the court lacked jurisdiction**

Appellant advanced the argument in her "Motion to Dismiss" the action, filed after the entry of judgment and decree by the lower court, that jurisdiction was lacking over the present action. The reason stated for this contention was that the tenant, Mrs. White, had filed an action relative to the rent overcharges received from her in the Los Angeles Municipal Court on June 30, 1947, which action was pending at the commencement of the present suit (R. 27). But this claim of the appellant ignores the fact that



the action filed herein by the Housing Expediter was also based on overcharges collected by the appellant from another tenant, Mrs. Woodfaulk (R. 14). Therefore, the pendency of an action by a single tenant clearly could not affect the jurisdiction of the court to consider the suit of the Housing Expediter at least insofar as it was based on overcharges collected from another tenant.

The jurisdictional challenge of the appellant is couched in terms of "lack of jurisdiction" (R. 27; Appellant's Brief, p. 10). While the Sixth Circuit Court has not disapproved of such terminology where the rule of comity has been invoked in a proper case,<sup>12</sup> yet the circumstances of appellant's attempted reliance on "comity" in the case at bar plainly do not warrant the assertion of any "lack of jurisdiction." The appellant admittedly (Br. p. 8) did not raise the point of comity as a bar to any branch of the present action in any of her pleadings or at any time during trial. As is shown by the record (at p. 27-28), it was not until after trial and entry of judgment on December 2, 1948 (R. 26) that the pending action was first called to the attention of the District Court on February 9, 1949. Further, the tenant-plaintiff in the State Court had endeavored to abandon her action (R. 29), and so far as appears from the Record herein (R. 29), no further positive proceedings beyond filing the complaint had been taken for more than some fourteen months prior to the judgment herein. Nor does the appellant claim that there is

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<sup>12</sup> See *Gillis v. Keystone Mut. Casualty Co.*, 172 F. 2d 826, at p. 830.



even a probability that a decision will ever be reached in the State Court action. In the light of the foregoing circumstances, there was no ground for claiming "the forbearance" of the District Court (*Gregg v. Winchester, supra*, 173 F. 2d at 514). None of the cases cited by the appellant require such result. Nor is there presented a conflict with the processes of the State Court over a "res" (see, *Gillis v. Keystone Casualty Co.*, 172 F. 2d at p. 829).

### III

**There is no merit to the contention that the commencement of a suit at law deprived the Housing Expediter of authority to bring an equitable action for restitution**

In the appellant's statement of points on appeal (Point 4, R. 50), there is advanced the contention that "the tenant, having elected to sue at law, the Housing Expediter was without right or authority to sue in equity, and seek restitution as an incident thereto." This point has not been argued or touched on in appellant's brief. In any event, appellant's proposition clearly finds no support in either the provisions of the Act of 1942 or the 1947 Rent Act. Section 205 (e) of the 1942 Act (*infra*, p. 40), which authorized the tenant's action for statutory damages, does provide that "a judgment in an action for damages *under this subsection* [(e)] shall be a bar to the recovery *under this subsection* of any damages in any other action \* \* \*." [Italics supplied.] Thus the language of Section 205 (e) does not even by implication limit the authority of the Housing Expediter under the separate subsection (a) of Section 205 of

the Act of 1942 (*infra*, p. 39) to invoke the equitable jurisdiction to the courts conferred by the latter subsection of the statute. Nor does Subsection (a) under Section 205 of the Act of 1942 (*infra*, p. 39) contain any such limitation on the Expediter's authority to seek restitution.

Moreover, it is well established that Sections 205 (a) and (e) of the Act of 1942 involve separate causes of action for different relief. *Porter v. Warner Holding Co.*, 328 U. S. 395, 402; *Woods v. Richman*, 174 F. 2d 614, 616 (C. A. 9th); *Creedon v. Randolph*, 165 F. 2d 918, 919 (C. A. 5th); *Woods v. Witzke*, 174 F. 2d 855, 857 (C. A. 6th); *Woods v. McCord*, 175 F. 2d 919, 921 (See particularly Footnote 5) (C. A. 9th).

This Court, in *Woods v. Richman*, *supra*, noted the differences between actions under Sections 205 (a) and (e) by stating (174 F. 2d at p. 616):

Section 205 (a) provided a cause of action separate from that set out in § 205 (e), and as respects such cause the one year limitation found in the latter section is not controlling. *Blood v. Fleming*, 10 Cir., 161 F. 2d 292. The remedy afforded by § 205 (a) is in addition to others set up in the Act; and an order of restitution may be granted with or without a prohibiting injunction.

Comments to the same effect by other courts are found in the cases cited above. Thus, both the provisions of Sections 205 (a) and (e) of the Act of 1942 and the decisions of the courts thereunder refute the contention of the appellant that the filing of the tenant's action at law precluded the present suit for equitable relief by the Housing Expediter.

## IV

**There is no merit to the contention that the judgment of the trial court is unenforceable by reason of the asserted expiration of the 1947 Rent Act and the expiration in fact of the Act of 1942**

The appellant urges in Points III and IV (pp. 11, 12) of her brief that the court below had no jurisdiction to grant relief in this action because "the 1942, 1947, and 1948 Acts all expired by their terms on or prior to April 1, 1949" and because the Act of 1942 had expired prior to the filing of this action on July 23, 1948. It is pertinent to note, in the first place, that appellant is under a misapprehension in predicated her argument on the expiration of the "1947 and 1948 Acts" \* \* \* "on or prior to April 1, 1949." For the rent provisions of the Housing and Rent Act of 1947 (Pub. L. 129, 80th Cong.), as amended and extended to March 31, 1949, by the Housing and Rent Act of 1948 (Pub. L. 464, 80th Cong.), has been further continued in force to June 30, 1950, by Section 203 (g) of the Housing and Rent Act of 1949 (Pub. L. 31, 81st Cong.).<sup>13</sup> There-

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<sup>13</sup> Section 203 (g) of Public Law 31, 81st Congress, provides; "Section 204 (f) of such Act [Housing and Rent Act of 1947], as amended, is amended to read as follows:

"(f) The provisions of this title shall cease to be in effect at the close of June 30, 1950, or upon the date of a proclamation by the President or upon the date specified in a concurrent resolution by the two Houses of Congress, declaring that the further continuance of the authority granted by this title is not necessary because of the existence of an emergency, whichever date is the earlier; except that as to rights or liabilities incurred prior to such termination date, the provisions of this title and regulations, orders, and requirements thereunder shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any such right or liability.'"

fore, the 1947 Rent Act did not expire on or prior to April 1, 1949. Further, it must be emphasized that the Act of 1947 does contain a savings clause "as to rights and liabilities incurred prior to" June 30, 1950, which authorizes "any proper suit or action with respect to any such right or liability." This savings clause was made a part of the Act of 1947 by Section 203 (g) of the 1949 Act, approved March 30, 1949.<sup>14</sup>

Prior to the incorporation of the savings clause in the 1947 Rent Act by the enactment of Section 203 (g) of the 1949 rent statute, the general savings provision of the Federal Code, Title I, U. S. Code, Section 109 (*infra*, p. 51) served to preserve causes of action for violations of rent regulations under the 1947 Act. Cf. *United States v. Carter*, 171 F. 2d 530 (C. A. 5th), sustaining authority of the Government to maintain restitution suit for violations of maximum sales prices after the expiration of the Veterans' Emergency Housing Act of 1946; *National Labor Relations Board v. National Garment Co.*, 166 F. 2d 233, 236 (C. A. 8th), ruling that the general savings provision preserved liabilities rising under the National Labor Relations Act prior to amendment in 1947. As the Fifth Circuit Court stated in *United States v. Carter*, 171 F. 2d (at p. 532):

[2] Under this section [109] penalties and liabilities accruing while an act was in force may be enforced after the repeal unless there is an express provision to the contrary in the repealing statute, *and if a temporary statute expires by its own terms, the same is true un-*

<sup>14</sup> Section 203 (g) is set forth in footnote 13, *supra*.



*less such temporary statute also contains an express provision to the contrary.*" [Italics supplied.]

The appellant concedes (Brief, at p. 11) that the Act of 1942 contained a savings clause in Section 1 (b) thereof (*infra*, p. 37). But, appellant contends that this savings clause does not embrace an equitable action for injunction or restitution. This court has recently ruled against this precise proposition now urged by the appellant, in *Woods v. Richman*, 174 F. 2d 614. There the District Court had excluded evidence of rent overcharges received prior to the expiration of the Act of 1942 because the Expediter filed his suit after the Act terminated. On appeal, this Court held that the trial court was in error in declining to try the issue of overcharges with reference to the relief of restitution and stated:

Section 1 (b) of the 1942 Act, as amended, fixed June 30, 1947, as the termination date thereof "except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability, or offense." This saving clause preserves accrued rights and liabilities whether or not suit on account thereof is started prior to the termination date. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 114, 119, 67 S. Ct. 1129, 91 L. Ed. 1375.

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The 1947 Act prohibits the demand or acceptance of any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947, provision being made by the Expediter for general adjustments. 50 U. S. C. A. Appendix, § 1894. And, as already noted, the provisions of § 205 (a) of the former Act were reenacted without change.

We think, therefore, that it continues to be appropriate for the courts to consider whether an order of restitution should be made as a means of giving effect to the declared policy of Congress.

By its ruling in the *Richman* case, *supra*, this Court has cut the ground from under appellant's reliance on the decision of the District Court in *Woods v. Gochnour*, 81 F. Supp. 457 (E. D. Wash.), decided December 28, 1948, appeal pending. In the *Gochnour* case, *supra*, Judge Driver held that a District Court was not authorized to order restitution of rent overcharges received prior to the termination of the Act of 1942 in an action commenced on July 12, 1948, or after the Act had expired. The conclusion thus reached by the lower court in the *Gochnour* case is contrary to the views quoted above from the *Richman* case, *supra*, and must, of course, be regarded as indirectly overruled.

The Eighth Circuit Court in *Ebeling v. Woods*, 175 F. 2d 242, followed the ruling of this Court in the *Richman* case. In affirming the grant of an order of restitution by the District Court in a suit filed after

June 30, 1947, for overcharges incurred under the Act of 1942, the appellate court remarked (at p. 244) :

Overcharges that had been made in the pulsative period while the Price Control Act itself was in effect might still in their cumulative effect become part of the base for a psychological spiral of inflation even after the Act had expired. And this fact, among others perhaps, may well have been the reason that Congress chose to allow the syphoning rights created by the Act to survive its termination, as to any previous undissipated overcharges.

See, also, *Woods v. Vendetti*, 85 F. Supp. 25, 26 (W. D. Pa.).

*Talbot v. Woods*, 164 F. 2d 493 (E. C. A.) cited at page 12 of Appellant's Brief, is not in point. There the Emergency Court of Appeals merely ruled that it had no jurisdiction under Section 1 (b) of the Act of 1942 (*infra*, p. 37) to entertain a complaint filed after June 30, 1947, challenging rent reduction orders, when there had been no enforcement proceedings predicated on those orders. It is thus plain that the Court below was authorized to enter judgment of restitution for overcharges under Sections 1 (b) and 205 (a) of the Act of 1942 (*infra*, p. 39), and Section 206 (b) of the 1947 Rent Act (*infra*, p. 47).

## V

**There is no merit to the contention that the removal of the tenants before filing of this action eliminated the equitable basis for the relief of restitution**

The appellant urges that the removal of the two tenants before the filing of this action precludes the granting of the equitable relief of restitution. To

sustain this contention, appellant has cited two decisions in neither of which was the legal effect of the removal of tenants upon the right to restitution considered. In *Paxson v. Smock*, 73 F. Supp. 793 (E. D. Pa.), cited at page 22 of Appellant's Brief, there was a suit by several tenants of housing accommodations owned by the State of Pennsylvania to enjoin the state and certain officials from evicting them. Two tenants, the Paxsons, vacated their accommodations prior to the decision of the case. Consequently, the Court held that there was no party before the Court with standing to seek injunctive relief with respect to the Paxson premises.

In *Woods v. Kooker*, 83 F. Supp. 362 (W. D. Ark.), the Court in the exercise of its discretion did not order restitution of rent overcharges received by the landlord. The Court pointed out circumstances surrounding the overcharges which were persuasive against the entry of the order, such as "the absence of complaints by the tenants while defendant was owner," "the expenses incurred by defendant on the property," "the steps taken by defendant to ascertain the status of his property under the Housing Act." Restitution was not denied because the tenant vacated the preinises prior to suit.

A contention similar to that made by appellant was rejected in *Creedon v. Evangelista*, 77 F. Supp. 538 (E. D. Pa.). In the *Evangelista* case, *supra*, the Housing Expediter sought "triple damages for rent overcharges over a period of one year and restitution of overcharges prior to that date". The defendant's answer alleged, *inter alia*, that it was "inequitable

after the termination of the tenancy for this suit to be pressed". The Court stated that this and other defenses did not bar summary judgment "as a matter of law" (77 F. Supp. at p. 538).

In *Creedon v. Randolph*, 165 F. 2d 918 (C. A. 5th), the District Court found that the landlord had rented the premises to a tenant for three months, and "that long after the statute of limitations had barred the right of tenant or administrator to institute suit for recovery of the overcharge under Sect. 205 (e) of the Act, this suit was brought \* \* \* under Sect. 205 (a), praying refund \* \* \*." Under such state of facts, the Appellate Court reversed the ruling of the District Court that there was no legal basis "to exercise the traditional equity powers and in so doing order restitution of the alleged overcharges" (165 F. 2d at p. 919).

In the *Randolph* case, *supra*, the Court discussed the nature of the remedy afforded by Section 205 (a) of the 1942 Act (*infra*, p. 39) (165 F. 2d 919):

The remedy invoked under Sec. 205 (a) appertains only to the Administrator as the representative of the Government in the enforcement of this law. That to require restitution of overcharges tends to enforce the law prohibiting them no one would deny. That it operates to confer a benefit on the tenant, who has not seen fit to act in her own behalf, does not detract at all from the enforcement effect nor alter its nature.

In *Woods v. Richman*, 174 F. 2d 614, 617, this Court quoted from the opinion of the Supreme Court in *Porter v. Warner Holding Co.*, 328 U. S. 395, 400:



In framing such remedies under Section 205 (a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved.

And the Supreme Court also stated in the *Warner Holding Co.* case, *supra*:

And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains; and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums.

In the light of the above comments by the courts, it is clear that the removal of tenants before suit has no bearing on the remedy of restitution which serves the public interest in the stabilization of rents, the prevention of inflation, and the restoration of illegal gains of the landord.

## VI

**There is no merit to the contention that the one-year limitation found in section 205 (e) of the Act of 1942 and section 205 of the 1947 Rent Act bars equitable relief sought by the Housing Expediter. Moreover, appellant's attack upon the validity of the Rent Director's order cannot affect the issue as to the applicability of the one-year limitation**

The appellant asserts that the one-year limitation of Section 205 (e) of the Act of 1942 (*infra*, p. 39) and Section 205 of the 1947 Act (*infra*, p. 43) bars



restitution for nearly all of the overcharges received. Since the present suit was filed July 23, 1948, it is argued that the one-year limitation defeats the claim based on overcharges to one tenant, Mrs. White, which accrued prior to April 22, 1947, and so much of the overcharges to the other tenant, Mrs. Woodfaulk, as accrued prior to July 23, 1947.

But the Circuit Courts of Appeals have uniformly ruled that the one-year limitation of Section 205 (e) of the Act of 1942 applying to statutory damage actions at law is not controlling with respect to the Housing Expediter's suit for injunctive relief under Section 205 (a) of the Act. *Woods v. McCord*, 175 F. 2d 919 (C. A. 9th); *Woods v. Richman, et al.*, 174 F. 2d 614 (C. A. 9th); *Woods v. Witzke*, 174 F. 2d 855 (C. A. 6th); *Creedon v. Randolph*, 165 F. 2d 918 (C. A. 5th); *Warner Holding Co. v. Creedon*, 166 F. 2d 119 (C. A. 8th). And, consistent with this well established principle under the practically identical Section 205 (a) of the Act of 1942, the courts have held that the Housing Expediter's suit for equitable relief pursuant to Section 206 (b) of the 1947 Rent Act (*infra*, p. 43) is not restricted by the one-year limitation on statutory damage actions provided in Section 205 of the latter Act. (*Woods v. Trbusek*, 83 F. Supp. 175 (S. D. N. Y.); *Woods v. Seideman*, d/b/a Lincoln Shore Apts., No. 48-C-1480 (N. D. Ill.), decided January 11, 1949.

In *Woods v. Richman*, *supra*, this Court declared (174 F. 2d at p. 616):

Section 205 (a) provided a cause of action separate from that set out in Section 205 (e),

and as respects such cause the one year limitation found in the latter section is not controlling.

Appellant's reliance on *Woods v. Gochnour*, *supra* (cited at p. 16 of her Brief) is misplaced, since the issue of the application of the one-year statutory damage limitation was not dealt with by the court in that case. Nor is *Sampson v. Thomas*, 76 F. Supp. 691 (E. D. Mich), cited by appellant (at p. 16 of Brief) in point, since it involved an action by tenants seeking treble damages for rent overcharges.

Contrary to appellant's contention, this question of the statute of limitations is not affected by the claim that the Rent Order establishing the maximum rent for the White Apartment was void.<sup>15</sup> Appellant's assertion that the Rent Order in question is invalid, is a matter not within the jurisdiction of the District Court or this court to consider. Under Section 204 (d) of the Act of 1942 (*infra*, p. 52), the Emergency Court of Appeals was given the exclusive jurisdiction to determine the validity of regulations and orders issued pursuant to the Act of 1942.<sup>16</sup> This Court stated in *Woods v. Kaye*, 175 F. 2d 886 (at pp. 888, 889):

\* \* \* the Emergency Court of Appeals was invested with the sole and exclusive jurisdiction of questions involving the validity of

<sup>15</sup> The Rent Order which appellant challenges is described at page 18 of Appellant's Brief.

<sup>16</sup> The appellant states (p. 18 of Brief) that the Rent Order was dated June 30, 1947, attempting to become effective retroactively from June 5, 1944, \* \* \*."

such orders, subject only to the grant of certiorari by the Supreme Court.

\* \* \* \* \*

It is our conclusion that the District Court does not have jurisdiction to inquire into that which could have and should have been appealed to the Emergency Court of Appeals.

See also, *Woods v. Stone*, 333 U. S. 472, 474; *Fleming v. Dashiell*, 161 F. 2d 612, 613 (C. A. 9th); *Woods v. Bobbitt*, 165 F. 2d 673, 675 (C. A. 4th); *Roupp v. Woods*, 176 F. 2d 544 (C. A. 10th).

The exclusive jurisdiction of the Emergency Court to consider objections to the validity of rent orders issued pursuant to the Act of 1942 and on which enforcement proceedings are based, has survived the termination of the Act. *Woods v. Hills*, 334 U. S. 210, 217, Independent Offices Appropriation Act, 1950 (p. 16, Pub. L. 266, 81st Cong., *infra*). Cf. *Herman v. Woods*, 175 F. 2d 781, 784 (E. C. A.), where the Emergency Court exercised jurisdiction to review and set aside a rent reduction and refund order issued June 24, 1947. Since the District Court was not authorized to consider objections to the validity of the rent order concerned, the issue of the one-year limitation is not affected by this line of attack on the restitution order by the Court below.

## VII

**There is no merit to the contention that the complaint failed to state a cause of action, and the judgment was, therefore, unfounded**

The appellant advances as one of the grounds for reversal the circumstance that certain paragraphs of the complaint contain the phrase "and/or". It is

claimed that the use of this expression resulted in the failure of the complaint to state a cause of action because of uncertainty upon which of the Federal Acts (i. e. Act of 1942 or 1947 Rent Act) the action is founded. However, examination of the complaint in its entirety plainly shows that the Housing Expediter was basing his action upon violations under both statutes. By reference, there was incorporated in Paragraph VII of the complaint an attached Schedule (R. 8) which specified the essential facts relative to the violations. This schedule stated periods of overcharges which were included under the effective periods of both Acts.

The complaint "must be considered and construed as a whole, and only in that way can its true intent and impact be ascertained. *Kasishke v. Keppler*, 158 F. 2d 809, 811 (C. A. 10th); Cf. *Hazen v. National Rifle Ass'n of America*, 101 F. 2d 432, 435 (App. D. C.). And thus construed in the light of the specific facts set forth in the Schedule to the complaint, there was no uncertainty as to the intent to set forth causes of action under both Acts.

Further, the appellant found no such difficulty in construing the complaint when her answer was filed to the complaint in the District Court. Any objection as to the indefinite nature of the pleading was then available to appellant by way of a motion for a more definite statement pursuant to Rule 12 (e), Federal Rules of Civil Procedure;<sup>17</sup> *Porter v. Kara-*

<sup>17</sup> Rule 12 (e) reads, in part:

"If a pleading to which a responsible pleading is permitted is so vague or ambiguous that a party cannot reasonably be required



vas, 157 F. 2d 984, 985 (C. A. 10th). But not until some time after trial and judgment was entered did the appellant complain that the complaint was indefinite (R. 28).<sup>18</sup> In any event, the court below made findings that the appellant received rent overcharges "in excess of the maximum rents established by both the Act of 1942 and the 1947 Rent Act and Regulations thereunder (R. 13) for periods when both of these Acts were in force (R. 14).<sup>19</sup> In the absence of any evidence to the contrary, the findings of the trial court "are presumed to be supported by the evidence \* \* \* and cannot be set aside." *Griffiths Dairy v. Squire*, 138 F. 2d 758, 760 (C. A. 9th); *United States v. Foster*, 123 F. 2d 32, 34 (C. A. 9th). The appellant has supplied no evidence from the trial proceedings to impeach the correctness of the findings (R. 56). Accordingly, the trial court granted the relief to which the Housing Expediter was entitled based upon the proof present in the case. Rule 54

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to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired."

<sup>18</sup> The equitable action for restitution is not, as appellant asserts, "a penal action." *Bowles v. Skaggs*, 151 F. 2d 817, 821 (C. A. 6th). And, even as to the treble damage action under Section 205 (e) of the Act, this Court has ruled that the "treble damage sanction is remedial rather than punitive." *Kessler v. Fleming*, 163 F. 2d 464, 468 (C. A. 9th). To the same effect, see *Crary v. Porter*, 157 F. 2d 410, 414 (C. A. 8th); *Woods v. Robb*, 171 F. 2d 539, 541 (C. A. 5th); *Amato v. Porter*, 157 F. 2d 719 (C. A. 10th).

<sup>19</sup> Findings of Fact No. 7 sets forth a period of overcharge from "6-5-44 to 3-17-47" for the White apartment and from "12-11-46 \* \* \* to 9-13-47" for the Woodfaulk accommodation. June 30, 1947, was the terminal date of the Act of 1942, and the 1947 Rent Act became effective July 1, 1947.



(c) Rules of Civil Procedure.<sup>20</sup> *United States v. Zara Contracting Co.*, 146 F. 2d 606, 609 (C. A. 2nd); *Garland v. Garland*, 165 F. 2d 131, 133 (C. A. 10th); *Keiser v. Walsh*, 118 F. 2d 13, 14 (App. D. C.). Thus, any objection to the pleadings ought not to prevail on appeal where the trial court has found facts which constituted violations of the Act of 1942 and the 1947 Rent Act (R. 14, 15), and awarded the relief to which the facts thus found entitled the Expediter under Section 205 (a) of the former Act and Section 206 (b) of the latter Act.

In any event, even if the complaint were deemed to be defective, the District Court was authorized to treat the complaint as amended to conform to the proof. *Balabanoff v. Kellogg, et al.*, 118 F. 2d 597, 599 (C. A. 9th), cert. denied, 314 U. S. 635; *American Fork and Hoe Co. v. Stampit Corp.*, 125 F. 2d 472, 474 (C. A. 6th). Rule 15 (b), Rules of Civil Procedure.<sup>21</sup> In *Balabanoff v. Kellogg, supra*, this court stated in answer to the contention raised after decree

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<sup>20</sup> Rule 54 (c) states, in part:

“\* \* \* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.”

<sup>21</sup> Rule 15 (b) reads, in part, as follows:

“*Amendments to Conform to the Evidence.*—When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. \* \* \*

that the complaint failed to state a cause of action (118 F. 2d 599):

In the absence of appropriate attack upon it we think the complaint must be held to state facts sufficient to entitle appellees to some relief. \* \* \* We here treat the complaint as amended to conform to the proof.

### VIII

**The contention that the tenant's removal from the landlord's accommodations rendered injunctive relief moot in this case is lacking in merit**

Appellant asserts that the court below erred in granting the injunction against future violations of the 1947 Rent Act because both tenants had moved out of the property before this action was filed. But the Supreme Court ruled, *Porter v. Lee*, 328 U. S. 246, that the vacating of the landlord's premises does not render injunctive relief moot, and stated (at p. 251-252):

Moreover, here the Administrator sought to restrain not merely the eviction of Beever but also that of any other tenant of the landlord as well as other acts in violation of the Regulation. Section 205 (a) authorizes the District Court in its discretion to grant such a broad injunction upon a finding that the landlord has engaged in violations. See *Hecht Co. v. Bowles*, 321 U. S. 321. If the eviction proceeding actually was a violation of the Regulation, then Beever's vacating the premises was merely the completion of one violation. The issue as to whether future violations should be enjoined

was still before the Court and was by no means moot.

In *Hecht v. Bowles*, 321 U. S. 321, the Supreme Court stated, with reference to the authority of the District Court to issue an injunction after violations were completed (at p. 327):

We agree that the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction under Section 205 (a).

In an action brought by the Housing Expediter pursuant to Section 206 (b) of the 1947 Rent Act, seeking restitution and injunctive relief based on rent overcharges, the Court held (*United States v. Pinkston*, 85 F. Supp. 516, W. D. Ky.):

The fact that the tenant has vacated the premises is of no concern on the injunctive phase of the case (at p. 517).

In *Bowles v. Quon*, 154 F. 2d 72, at p. 73, this Court pointed out:

The injunction imposes no punishment—it merely insures better compliance with the Act. The injunction works no hardship on one who intends to comply with the law.

Clearly, the removal of the tenants did not remove the reason for the injunction to issue, as stated by this Court.

Nor does it appear, in view of the violations of the appellant which extended over many months, that the trial court abused the discretion possessed under Section 205 of the Act of 1947. This court “will not

interfere with or control the action of the court below in such case unless the court has been found guilty of a clear abuse of discretion" (*Bowles v. Quon*, supra, at p. 73).

Appellant states in her brief (at p. 21) that the property was unoccupied at the time of filing of this action. But there is no statement that appellant is not now a landlord, nor is there any reason to believe that she will not rent again when she finds a suitable tenant. Thus, there was still reason for the court below to anticipate and restrain other related unlawful acts. *Labor Board v. Express Pub. Co.*, 312 U. S. 426, 435; *Bowles v. Leithold*, 155 F. 2d 124, 127 (C. A. 3rd); *Bowles v. Montgomery Ward & Co.*, 143 F. 2d 38, 43 (C. A. 7th); *Bowles v. Luster*, 153 F. 2d 382, 384 (C. A. 9th). Hence, injunctive relief was properly granted pursuant to Section 206 (b) of the 1947 Rent Act (*infra*, p. 44).

#### CONCLUSION

It is respectfully submitted that the judgment of the Court below is correct in all respects and should be affirmed.

Respectfully submitted.

ED DUPREE,  
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HUGO V. PRUCHA,  
*Assistant General Counsel,*

ISADORE A. HONIG,  
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*Washington 25, D. C.*



## APPENDIX

### THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED (50 U. S. C. A., SEC 901 ET SEQ.)

SEC. 1. (b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.



SEC. 204. (e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code, in-

volving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provisions of the regulation, order, or price schedule involved in the proceeding \* \* \*.

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section

4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SEC. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the ap-



plicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. \* \* \*

HOUSING AND RENT ACT OF 1947, AS AMENDED BY PUB. L. 464, 80TH CONG., APPROVED MARCH 30, 1948 (50 U. S. C. A., APP. SEC. 1881 ET SEQ.)

SEC. 204. \* \* \*

(b) <sup>1</sup> (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control

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<sup>1</sup> This subsection was amended by Section 202 (b), Public Law 464, 80th Congress, to read as provided above. The original subsection read as follows:

"SEC. 204. (b) During the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities or further to carry out the purposes and provisions of this title: *And provided further,* That in any case in which a landlord and tenant, on or before December 31, 1947, voluntarily enter into a valid written lease in good faith with

Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations.

(2) In any case in which a landlord and tenant, on or before December 31, 1947, in accordance with the provisions of this subsection as then in effect, voluntarily entered into a valid written lease in good faith with respect to any housing accommodations, such

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respect to any housing accommodations for which a maximum rent is in effect under this section and such lease takes effect after the effective date of this title and expires on or after December 31, 1948, and if a true and duly executed copy of such lease is filed, within fifteen days after the date of execution of such lease, with the Housing Expediter, the maximum rent for such housing accommodations shall be, as of the date such lease takes effect, that which is mutually agreed between the landlord and tenant in such lease if it does not represent an increase of more than 15 per centum over the maximum rent which would otherwise apply under this section. In any case in which a maximum rent for any housing accommodations is established pursuant to the provisions of the last proviso above, such maximum rent shall not thereafter be subject to modification by any regulation or order issued under the provisions of this title. No housing accommodations for which a maximum rent is established pursuant to the provisions of the last proviso above shall be subject, after December 31, 1947, to any maximum rent established or maintained under the provisions of this title."



housing accommodations shall not be subject to any maximum rent established or maintained under the provisions of this title unless such lease is hereafter terminated or expires before March 31, 1949, in which case the maximum rent for such housing accommodations shall, through March 31, 1949, be not in excess of 15 per centum over the maximum rent which in the absence of a lease would be in effect with respect thereto on the date of enactment of the Housing and Rent Act of 1948: *Provided*, That the landlord and a tenant (including any new tenant) may enter into a new voluntary lease subject to the conditions, specified in paragraph (3) of this subsection, applicable with respect to landlords and tenants who have not heretofore entered into voluntary leases, except that no maximum rent need be in effect on the date of execution of such new lease.

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided*, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the

date of such violation. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same plaintiff prior to the institution of the action in which such judgment was rendered.

SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204 or otherwise to do or omit to do any act in violation of any provision of this title.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

# HOUSING AND RENT ACT OF 1949 (PUBLIC LAW 31, 81ST CONG.)

SEC. 203. \* \* \*

(g) Section 204 (f) of such Act, as amended, is amended to read as follows:

(f) The provisions of this title shall cease to be in effect at the close of June 30, 1950, or upon the date of a proclamation by the President or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this title is not necessary because of the existence of an emergency, whichever date is the earlier; except that as to rights or liabilities incurred prior to such termination date, the provisions of this title and regulations, orders, and requirements thereunder shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any such right or liability.

## HOUSING AND RENT ACT OF 1947, AS AMENDED BY PUBLIC LAW 31, 81ST CONG.

SEC. 204. \* \* \*

(f) The provisions of this title shall cease to be in effect at the close of June 30, 1950, or upon the date of a proclamation by the President or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this title is not necessary because of the existence of an emergency, whichever date is the earlier; except that as to rights or liabilities incurred prior to such termination date, the provisions of this title and regulations, orders, and requirements thereunder shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any such right or liability.

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided*, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided*, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute



one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered.

## PROHIBITION AND ENFORCEMENT

SEC. 206. (a) It shall be unlawful for any person to demand, accept or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

RENT REGULATION FOR HOUSING, ISSUED PURSUANT TO  
THE EMERGENCY PRICE CONTROL ACT OF 1942 (10  
F. R. 13528)



SEC. 2. *Prohibition against higher than maximum rents.*—(a) *General prohibition.*—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

SECTION 4. *Maximum rents.*—Maximum rents (unless and until changed by the Administrator as provided in Section 5) shall be:

(e) *First rent after effective date.*—(1) Newly constructed housing accommodations without priority rating first rented on or after the effective date of regulation, or (2) housing accommodations changed on or after such effective date so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time during the two months ending on the maximum rent date nor between that date and the effective date, the first rent for such accommodations after the change or the effective date, as the case may be, but in no event more than the maximum rent provided for such accommodations by any order of the Administrator issued prior to September 22, 1942. Within 30 days after so renting the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

If the landlord fails to file a proper registration statement within the time specified (except where a registration statement was

filed prior to October 1, 1943), the rent received for any rental period commencing on or after the date of the first renting or October 1, 1943, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under section 5 (c) (1). Such amount shall be refunded to the tenant within 30 days after the date of issuance of the order. If the Administrator finds that the landlord was not at fault in failing to file a proper registration statement within the time specified, the order under section 5 (c) (1) may relieve the landlord of the duty to refund. Where a proper registration statement was filed before March 1, 1945, the landlord shall have the duty to refund only if the order under section 5 (c) (1) is issued in a proceeding commenced by the Administrator before September 1, 1945. Where a proper registration statement is filed on or after March 1, 1945, the landlord shall have the duty to refund only if the order under section 5 (c) (1) is issued in a proceeding commenced by the Administrator within three months after the date of filing of such registration statement. The foregoing provisions and any refund thereunder do not affect any civil or criminal liability provided by the Act for failure to file the registration statement required by section 7.

SECTION 5. *Adjustments and other determinations.*

(c) *Grounds for decrease of maximum rent.*—The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that:

(1) *Rent higher than rents generally prevailing.*—The maximum rent for housing accommodations under paragraph (c), (d), (e), (g), or (j) of section 4 is higher than the rent generally prevailing in the

Defense-Rental Area for comparable housing accommodations on the maximum rent date.

CONTROLLED HOUSING RENT REGULATION, ISSUED PURSUANT TO THE HOUSING AND RENT ACT OF 1947  
(12 F. R. 4331)

SEC. 2. *Prohibition against higher than maximum rents*—(a) *General prohibition*.—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of this regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. A reduction in the minimum space, services, furniture, furnishings, or equipment required under section 3 of this regulation shall constitute an acceptance of rent higher than the maximum rent. Lower rents than those provided by this regulation may be demanded or received.

MISCELLANEOUS

TITLE I, U. S. CODE, SECTION 109 (61 STAT. 633)

§ 109 Repeal of statutes as affecting existing liabilities.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under

such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action of prosecution for the enforcement of such penalty, forfeiture, or liability. (July 30, 1947, ch 388, § 1, Stat. 633.)

INDEPENDENT OFFICES APPROPRIATION ACT, 1950  
(p. 16, Pub. L. 266, 81st Cong.)

OFFICE OF THE HOUSING EXPEDITER

*Salaries and expenses*, Office of the Housing Expediter: \* \* \*

*Provided further*, That as to cases involving the functions transferred to the Office of the Housing Expediter by Executive Order 9841, Section 204 (e) of the Emergency Price Control Act of 1942, as amended shall be considered as remaining in full force and effect during fiscal year 1950.

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED  
(50 U. S. C. APP. SEC. 901 ET SEQ.)

SEC. 204 (d). Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation



or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.



No. 12281

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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MRS. LEE BROOKS, also known as MRS. GWENLYN BROOKS,  
*Appellant,*

*vs.*

TIGHE E. WOODS, Housing Expediter, Office of the  
Housing Expediter,  
*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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No. 12281

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

---

MRS. LEE BROOKS, also known as MRS. GWENLYN BROOKS,  
*Appellant,*

*vs.*

TIGHE E. WOODS, Housing Expediter, Office of the  
Housing Expediter,  
*Appellee.*

---

**APPELLANT'S REPLY BRIEF.**

---

**Further Statement of Facts.**

Appellant is filing a motion to have the court inspect certain exhibits which were designated in appellant's "Designation of Parts of Record on Which Appellant Relies and to Be Printed," but which were not included in the printed transcript of record. These exhibits are named in paragraphs 17 and 19. [Tr. p. 56.] They are as follows:

Plaintiff's Exhibit 2A, and also the photostatic enlargement of Plaintiff's Exhibit 2A which is a Registration of the rental dwelling of the apartment occupied by the tenant, Mrs. Harold White. On the back of this exhibit is shown the dates of filing etc., and a notation of the order for lowering the maximum legal rental from the alleged amount of \$15.50 per week to \$10.00 per week, purporting



to make this amount retroactive from June 5, 1944, although the order is dated June 30, 1947.

This memorandum which is, in effect, the order of the O.P.A., reads as follows:

“Docket No. 255490 Maximum Legal Rent has been changed from 15.50 to 10.00 per wk. Order dated 6/30/47 Effective ~~first rental period after~~ from June 5, 1944.”

This is the order which appellant claims the O.P.A. administrator had no jurisdiction or authority to make (App. Op. Br., Point VI, pp. 18 to 20) by reason of the fact that the regulations printed on page 20 of appellant's opening brief were not followed; and which we claim void, not because of some defect or irregularity in the order, *but because of want of authority or jurisdiction to make it without the required notice to the tenant which the office did not give, and which it must be admitted, was not followed.*

The motion to have the court inspect exhibits also applies to the file in the Municipal Court Action No. 819629 described in paragraph 19 of the designation of parts of the record [Tr. p. 56], not printed in the transcript. This file will show the court the nature of the complaint in the state court action, discussed on this appeal; and shows that the subject matter of the state suit is identical with item for which restitution of over-payment of rent was sought by the expediter for Mrs. White, *and for which judgment was rendered as the main object of this action.*

Further facts will be stated in answer to the points made by appellee in each point to which they relate. For convenience, our point numbers in this reply brief will correspond to the point numbers in appellee's brief.

## POINTS I, II, and III.

Answer to Points I, II, and III of Appellee's Brief and Relating to Points I, II, and III of Appellant's Opening Brief.

THE DISTRICT COURT HAD NO JURISDICTION OF THIS CASE.

The cases cited by appellee do not sustain their contention that the state court action did not deprive the District Court of jurisdiction of the same *rem*, to wit: the restitution of the claimed overcharge of the White Rental Unit.

Neither the cases cited by appellee, nor the attempted distinctions between the procedure in a state court action and District Court action in equity answer the law declared by the court in this circuit, in

*Gregg v. Winchester* (9th Cir.), 173 F. 2d 512.

This applies to the claim for restitution as to the White Tenancy for \$797.50 overcharge.

Assuming that the District Court would have jurisdiction over the claim to restitution as to the Woodfaulk Tenancy for \$127.00, it is obvious that should this court agree with our contention as to the lack of jurisdiction over the *rem* concerning the White overcharge, there should be a new trial as to the Woodfaulk Claim only, and the case dismissed in so far as it relates the White tenancy.

The arguments of counsel, to which are cited numerous decisions, give us, in our opinion, a distinction *without a*

*difference* as to the fundamental principles involved. Therefore, we do not answer these arguments in detail. As a matter of common sense, what difference does it make what procedure is used in court to get the identical *rem* for the Tenant White, namely, the \$797.50 sought in the first count in the complaint in this action? [Tr. pp. 2-5.] This action is in equity, as appellee concedes; and equity goes to the substance of things, and not the surface. The first count here is for restitution, and there is no denial by appellee that this is the main purpose of this action.

The case of *Butler v. Judge of United States District Court, etc.*, 116 F. 2d 1013, relied upon by appellee [Tr. p. 10] is quoted on a point not sustained by the facts in that case. A question, there involved, was whether the District Court should have stayed proceedings during the pendency of a state suit, and the writ to compel the District Court to proceed to trial was denied. In concluding the court's reasons for so deciding the matter, the court said,

“The pendency of the action in the State Court was not relied upon by the defendant as a ground of abatement, nor so treated by the Trial Court.”

#### POINT IV.

**The Right to Restitution in This Case Expired March 30, 1948 (After the Termination of the 1942 Act on June 30, 1945, and of the 1947 Act on March 30, 1948) Along With the Acts.**

This point, discussed in Points III and IV of the Opening Brief, pages 11 and 12, presents a new legal question in the Ninth Circuit so far as we can determine. The question here presented as to the failure of the alleged Savings Clauses in the 1942 and 1947 Acts to save actions pending when these acts expired, is urged as a new proposition by us in this case.

On the expiration of the 1948 Act on March 31, 1949 (Pub. L., 464, 80th Cong.) the acts in question had all expired, assuming that they were all locked together, and were not separate acts, which we do not concede. Therefore, the cases cited in Point III of the Opening Brief, pages 11 and 12, apply unless there is something in the Savings Clause to keep such actions alive. The procedure under the 1949 Act is entirely different.

The new point which we are urging in this appeal is that none of the Savings Clauses relied on by the appellee *apply to actions in equity*. They apply to a "proper suit" to recover or inforce "rights, liabilities or offenses." The Savings Clause in question (see App. p. 37 of Appellee's Br.) does not mention or imply equity actions. We do not see in Point IV of appellee's brief any argument or authority which directly passes upon this point and it is submitted that the case of *Woods v. Richman*,



174 F. 2d 614, does not decide this point as raised on this appeal. The action was filed before the termination of the 1947 Act, namely, in August, 1947. In that case, the court had a different state of facts than are here involved, and the case was sent back to the District Court to consider whether an order of restitution should be made.

Appellee states (p. 23 of his brief) that the case of *Woods v. Gochmour*, 81 Fed. Supp. 457, is now on appeal. We submit that the principles stated by the court in that case quoted in Point VI of the Opening Brief, pages 16 to 18 are sound and should apply in this case notwithstanding the decision in *Woods v. Richman* which fails to pass upon the point urged by us that the savings clause in question (Sec. 1(b) appearing in [50 U. S. C. A., Sec. 901 *et seq.*], page 37 of appendix to Appellee's Brief) does not apply to equity cases.

The other cases cited by appellee, pages 23 and 24 on this point are not controlling here. The facts are different from those in this case.

*Ebeling v. Woods*, 175 F. 2d 242, was a case in which the action was filed September 26, 1947, while here, the action was filed July 23, 1948. In that case, restitution alone, and not equitable relief was sought.

*Woods v. Vendetti*, 85 Fed. Supp. 25, 26, appears from the opinion to have been filed before the termination of the Act of 1942.



## POINT V.

### **Answer to Points V and VIII of Appellee's Brief Relative to Equitable Basis for Jurisdiction.**

Points V and VIII of Appellee's Brief are in answer to Point VIII of our Opening Brief, pages 21 and 22.

Appellant is relying upon principles rather than analogous cases on the question of whether or not the facts in the case at bar warrant equitable relief.

Assuming that this court holds that the District Court had jurisdiction under the ruling in *Woods v. Richman*, 174 F. 2d 614 (distinguished also by the fact that in it there was no retroactive order) on the theory that it is appropriate for courts to consider whether restitution should be made as a means of giving effect to the general policy of Congress, we submit that under the facts here there is no basis for equitable or injunctive relief.

As pointed out in the Opening Brief, it cannot be questioned that the tenants were not in the property for a considerable period of time before this suit was filed. There was no showing that appellant, as a previous landlord, had rented the property after White and Woodfaulk moved out, and before this action was filed.

Appellee, on page 36 of his brief, says, "nor is there any reason to believe that she (appellant) will not rent again when she finds a suitable tenant. Thus, there was still reason for the court below to anticipate and restrain other related unlawful acts."

This argument is, to us, very foolish. If the Housing Expediter considers this reasoning correct, then he should use his whole force to restrain practically all the landlords who ever over-stepped the O.P.A. laws and showed any tendency to infringe the act. This would require a force many times larger than the existing one at a tremendous expense, to engage in the task of keeping landlords in line in a campaign of useless acts. Such injunctions to use the language of the court in *Woods v. Kooker*, 83 Fed. Supp. 362, 364, would "accomplish no useful purposes." Courts of equity certainly should not be used for foolish purpose, and this simmers down to the bare proposition in this case (which is very far from equitable) that the equitable part of the action was mere pretext to get restitution through the Federal Court when the Expediter knew that the Judge in the state court was ready to deny relief to White on restitution in the Municipal Court Action. [See Tr. p. 39.]

We here urge the fact that the cases cited by appellee in his Points V and VIII are not applicable here. For illustration,

*Creedon v. Evangelista*, 77 Fed. Supp. 538, was a suit for triple damages and not an equitable suit;

*United States v. Pinkston*, 85 Fed. Supp. 516, W. D. Ky., was a treble damage case;

*Bowles v. Quon*, 154 F. 2d 72, was a meat case and not a rent case. Different principles apply in the price cases than to the rent cases.

## POINT VI.

**Under the Principles Declared in *Woods v. Gooch-*  
*nour*, 81 Fed. Supp. 457, the Action Was Barred;  
and This Question Is Affected by the Purported  
Retroactive Order.**

This point is in answer to Point VI of Appellee's Brief, pages 27 to 30, and Point VI of our opening brief, pages 15 to 20, inclusive.

Either the reasoning of the court in *Woods v. Gooch-*  
*nour*, 81 Fed. Supp. 457, quoted in our opening brief is  
correct or it is not. Appellee says that that case is now  
on appeal. Regardless of how the appellate court rules in  
that case, we submit that the same questions are presented  
here, and should be ruled upon as a necessary determi-  
nation in this appeal.

Appellee, in our opinion, has failed to show in his brief  
that the main and real purpose of this suit in the Dis-  
trict Court was not to sidestep the state court action,  
then pending, and use a Court of Equity for that purpose.  
If equitable principle means anything at all, this should  
not be done. It is for this reason that it appears to us  
that the arguments and cases cited under this point are  
not applicable.

THE ATTACK ON THE RETROACTIVE ORDER IS BASED NOT  
UPON ITS VALIDITY AS AN ORDER, BUT AN ABSO-  
LUTE WANT OF AUTHORITY TO MAKE IT.

Under the facts set forth on pages 18 to 20, inclusive, of the opening brief, the question presented affects the Expediter's authority, in the first place, to make the order, and not the correctness or validity of the order when made, because of some defect therein. Counsel for the Expediter on the trial and on the motions for a new trial and to dismiss the action insisted that we could not urge the invalidity of the order; and the authorities cited in Point VI, pages 29 and 30 are to this effect. However, appellant then argued to the contrary, and now urges that this was not the question, but rather that the retroactive order (see the quoted order in Statement of Facts herein; Pltf. Ex. 2A made on June 30, 1947, attempting to go clear back to June 5, 1944) was made without any right whatever, for the reason that the Expediter was without authority, without giving the notice under the regulations printed on page 20 of Appellant's Opening Brief (Secs. 1300.207 and 1300.362, Procedural Regulations "3").

In most of the cases cited by appellee throughout his brief, there was no such retroactive order made after the expiration of the 1942 Act and going back to 1944. Therefore, these cases are deemed by us to be not in point under the facts of this case. In this respect, we consider this a case of first impression on appeal. This applies particularly to the cases cited in Point VI of appellee's brief.

POINT VII.

**Appellant's Point V That the Complaint Failed to State a Cause of Action Is Well Taken; and This Object May Be Raised at Any Time.**

This is an answer to Appellee's Point VII, pages 30 to 34, in answer to our Point V in the Opening Brief, pages 13 and 14. The objection that the complaint is based on one statute "and/or" another statute, *is fundamental as to the statement of a cause of action at all*, and is not a mere uncertainty, which is raised only by a special motion to make the complaint more definite. It does not, within the meaning of Rule 12(e), Federal Rules of Civil Procedure, fail by reason of lack of details, *but because of a fatal defect as a matter of pleading.*

Complaints must always sustain a judgment, which this complaint does not do, for the reasons set out in the Opening Brief.

We respectfully submit that the judgment should be reversed, with costs to appellant.

Respectfully submitted,

E. W. MILLER,

ELON G. GALUSHA,

*Attorneys for Appellant.*





No. 12280

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JOHN NELSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

JAMES M. CARTER,

*United States Attorney,*

ERNEST A. TOLIN,

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No. 12280  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JOHN NELSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

I.

**Statement of Basis of Jurisdiction.**

Appeal from judgment rendered against Appellant Nelson by the United States District Court, for the Southern District of California, Central Division, upon a plea of guilty by said Appellant Nelson of violating Section 338 of Title 18, U. S. Code (1946 Ed.) (commonly known as the Mail Fraud Statute) as charged in Counts One and Two of the Indictment in this cause of action. [Indictment R. 2-5; Plea R. 11.] The Appellant was sentenced to a term of imprisonment of five years on each of Counts One and Two, said sentences of imprisonment to run consecutively and not concurrently, making a total period of imprisonment of ten years. Appellant was further sentenced to pay a fine of \$1,000 on each of said Counts One and Two, or a total fine of \$2,000, and to stand committed until said fine is paid. [Judgment R. 14-16.] Counts Three, Four, Five and Six of said Indictment

were dismissed on Motion of the United States Attorney. [Judgment R. 14-16.]

Thereafter, the Appellant duly filed Motion to reduce and correct sentence imposed. [R. 17-19.] Said Motion was duly considered by The Honorable Wm. C. Mathes, United States District Judge, and upon Findings of Fact and Conclusions of Law, an Order was duly entered by said Honorable Court denying the Motion of Appellant for reduction and correction of said sentence.

Thereafter, Appellant duly filed his Notice of Appeal from the judgment against him, within the time prescribed by law.

Thereafter, the record in this case was filed with the Clerk of this Honorable Court.

## II.

### Statement of the Case.

The record will show that on December 31, 1947, Appellant pleaded guilty to Counts One and Two of a six count Indictment charging violations of Title 18, Section 338, U. S. Code (1946 Ed.), and not guilty to Counts Three, Four, Five and Six, charging similar violations. [Plea R. 11.] Counts Three, Four, Five and Six were dismissed on April 14, 1947, on Motion of the Government. [Judgment R. 15.]

Counts One and Two of the Indictment, to which Appellant pleaded guilty, and to which judgment was entered against him, charge, in substance, that Appellant “. . . devised a scheme to defraud . . .” persons referred to in said Indictment, and “. . . to obtain money and property by means of false and fraudulent representations and promises contained in advertisements which he caused to be published in” newspapers named in said Indictment,

“well knowing at the time that the pretenses, representations and promises would be false when made.” [Indictment R. 1-5.]

Count One further charges that “On or about December 10, 1946, at Los Angeles, Los Angeles County, California, . . .” Appellant “for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Joel Nikolauson, 108 Canal Drive, Turlock, California.” [Indictment R. 1-3.]

Count Two further charges that “On or about November 18, 1946, at Los Angeles, Los Angeles County, California,” Appellant “for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Costa Mesa Globe Herald, Costa Mesa, California.” [Indictment R. 4-5.]

### III.

#### Argument.

There is but one question presented on this record for consideration by this Honorable Court, namely, whether the substantive counts constitute separate offenses or one single offense.

Appellee contends that each count constitutes a separate offense, and that the maximum penalty provided by the Statute can be imposed upon each separate Count.

In this connection, the record will show that Count One and Count Two charge that for the purpose of executing the aforesaid scheme and artifice to defraud, letters were deposited at two different times, to-wit, the mailing of the letter in Count One occurred on December 10, 1946, and the mailing of the letter in Count Two occurred on



November 18, 1946. On this point the law is well settled that the statute denounces as separate crimes each separate deposit of a letter in the mail for the unlawful purpose.

The law, apparently, is conclusive to the effect that each separate use of the mail, in execution of a continuing fraudulent scheme, constitutes a punishable offense.

*Mitchell v. U. S.* (C. C. A., N. M., 1944), 142 F. 2d 480, cert. den. 65 S. Ct. 49, 323 U. S. 747, 89 L. Ed. 598;

*Weatherby v. U. S.* (C. C. A., Okla., 1945), 150 F. 2d 465.

The gist of the offense under this section denouncing use of the mails to promote fraud is the mailing of a letter in the execution of scheme to defraud, and mailing and letter itself constitute the *corpus delicti*, and each letter deposited in or removed from the post office in furtherance of a fraudulent scheme is a separate violation of this section.

*Bozel v. U. S.* (C. C. A., Ohio, 1943), 139 F. 2d 153, cert. den. 64 S. Ct. 937, 321 U. S. 800, 88 L. Ed. 1570, rehearing denied 64 S. Ct. 1054, 322 U. S. 768, 88 L. Ed. 1596.

Under this section making use of mails in connection with a scheme to defraud an offense, a single scheme to defraud may involve a multiplicity of ways and means of action and procedure, and it may be that the complete execution of a single scheme will involve commission of more than one criminal offense.

*U. S. v. MacAlpine* (C. C. A., Ill., 1942), 129 F. 2d 737;

*Mansfield v. U. S.* (C. C. A., Tex., 1946), 155 F. 2d 952.

Several letters mailed in pursuance of a scheme to defraud constitute separate offenses under this section.

*Becker v. U. S.* (C. C. A., Cal., 1937), 91 F. 2d 550.

The mailing of each letter containing forged supply orders whereby relief funds were misappropriated was a distinct substantive offense under this section.

*Stumbo v. U. S.* (C. C. A., Ky., 1937), 90 F. 2d 828, cert. den. 58 S. Ct. 282, 302 U. S. 755, 82 L. Ed. 584.

Each mailing constitutes separate violation of this section.

*Spirou v. U. S.* (C. C. A., N. Y., 1928), 24 F. 2d 796, cert. den. 48 S. Ct. 559, 277 U. S. 596, 72 L. Ed. 1006.

While the practice of treating two letters relating to the same fraud as separate offenses is not approved, conviction on such a charge, resulting in two maximum sentences, cannot be set aside.

*U. S. v. Steinberg* (C. C. A., N. Y., 1932), 62 F. 2d 77, cert. den. 53 S. Ct. 526, 289 U. S. 729, 77 L. Ed. 1478.

Each individual act of taking a letter or package from a post office or putting a letter or package in a post office, in furtherance of a scheme to defraud, constitutes separate and distinct offenses, and each violation may be separately punished.

*U. S. ex rel. Bernstein v. Hill* (C. C. A., Pa., 1934), 71 F. 2d 159.

IV.

**Conclusion.**

It is respectfully submitted that Count One and Count Two of the Indictment charge separate offenses against the laws of the United States; that the Appellant was not sentenced twice for a single offense, and that the Motion to correct an illegal sentence was properly denied, it being shown that the sentence imposed by the Trial Court was not an illegal sentence.

Respectfully submitted,

JAMES M. CARTER,

*United States Attorney,*

ERNEST A. TOLIN,

*Chief Assistant U. S. Attorney,*

NORMAN W. NEUKOM,

*Assistant U. S. Attorney,*

*Chief of Criminal Division,*

JACK E. HILDRETH,

*Assistant U. S. Attorney,*

*Attorneys for Appellee.*









Service of the within and receipt of a copy  
thereof is hereby admitted this.....day of  
September, A. D. 1949.

No. 12282

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT RICHTER,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

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ERNEST A. TOLIN,

*United States Attorney,*

NORMAN W. NEUKOM,

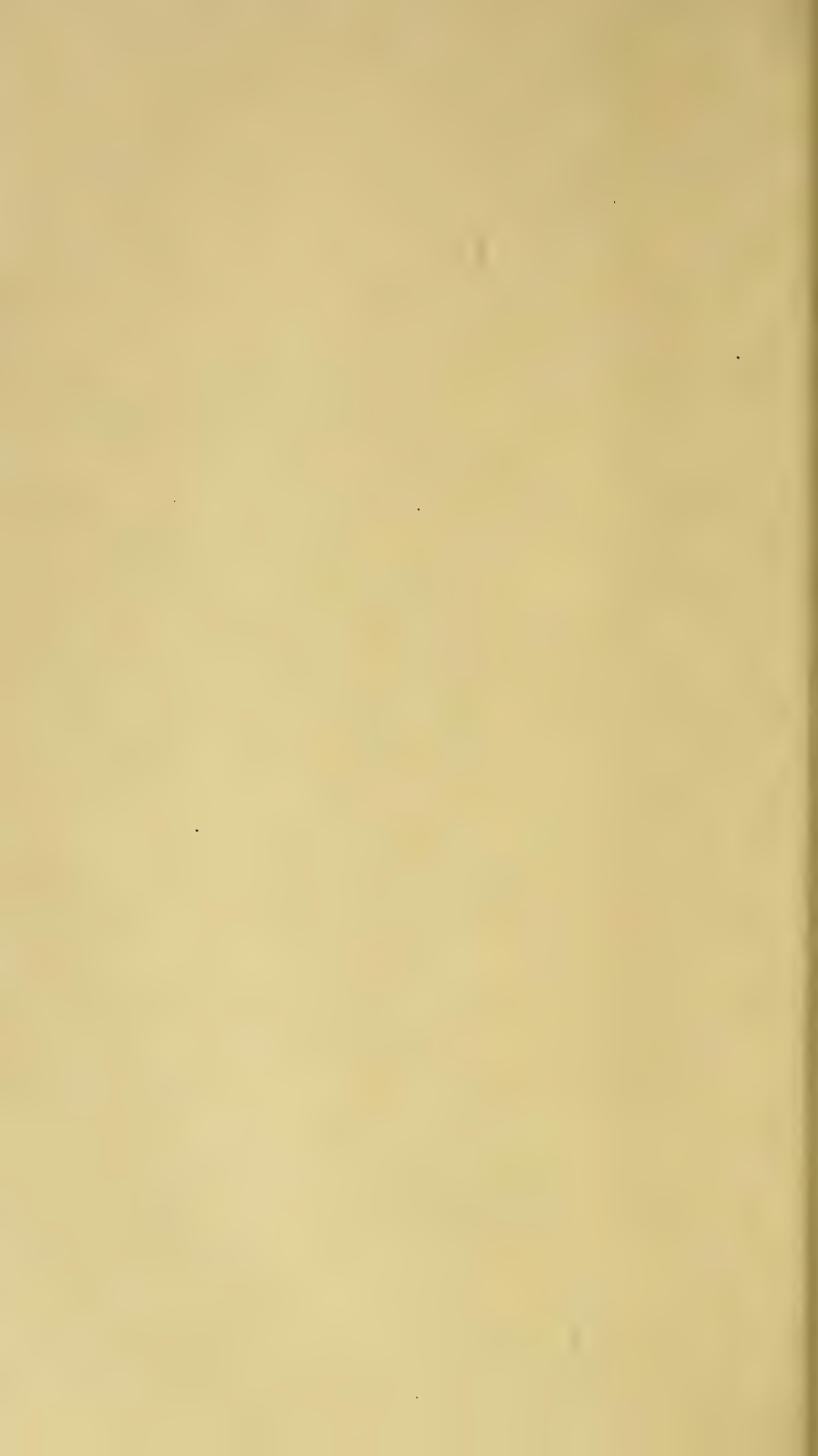
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No. 12282

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT RICHTER,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

### Jurisdictional Statement.

The appellant was indicted for failure to register under the provisions of the Selective Training and Service Act of 1948 (62 Stat. 604, 50 U. S. C. App. 98). The indictment was filed on November 3, 1948 [T. 2]. The District Court had jurisdiction of the cause under Title 18, Section 3231, effective September 1, 1948, which confers on the District Courts original jurisdiction of all offenses against the laws of the United States.

The offense charged was committed in the County of Los Angeles, State of California [T. 2]. On the 15th day of November, 1948, the defendant appeared before the District Court for the Central Division of the Southern

District of California for arraignment and plea and entered a plea of not guilty [T. 3]. Thereafter, the cause was tried by the Court pursuant to a waiver of jury signed by appellant [T. 4, 5]. The appellant was found guilty of the offense charged in the indictment [T. 8] and on May 16, 1949, was sentenced [T. 14, 15, 16]. An affidavit and application for leave to prosecute an appeal *in forma pauperis* and order thereon were filed on May 25, 1949 [T. 17, 18, 19]. A Notice of Appeal was filed on May 25, 1949 [T. 20, 21], and the appeal perfected thereafter [T. 22, 23].

This Court has jurisdiction under the provisions of Title 28, Section 1291, of the United States Code.

### Questions Involved.

(1) Does Congress have constitutional power to raise a peace-time army by conscription?

(2) Does enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 violate appellant's freedom of religion under the First Amendment?

(3) Are the registration provisions of the Selective Training and Service Act of 1948 separable from the other provisions of said Act?

(4) Does the Selective Training and Service Act of 1948 abridge freedom of religion in violation of the First Amendment by conferring the privilege of exemption only upon those conscientious objectors who believe in a Supreme Being?

## ARGUMENT.

Since there are no cases dealing with the constitutionality of the Selective Training and Service Act of 1948 that are concerned with the points involved herein, it is necessary to cite cases pertaining to the constitutionality of an act which is similar in scope and nature to this Act. The Selective Training and Service Act of 1940 is very similar to the Selective Training and Service Act of 1948, and there are many cases under the earlier Act, involving constitutional questions, which can be applied with the same force and effect to the present service law.

In *Hall v. Union Light, Heat & Power Co.*, 53 Fed. Supp. 817 (1944), the Court stated:

"It must be borne in mind that while the country was not at war the time this statute was enacted its purpose was for the general welfare and preparation for any eventuality. No rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to have a liberal construction. The general rule that legislators, as well as judges, must obey and support the constitution and have weighed the constitutional validity of every act they pass, giving to each statute the presumption of constitutionality, is of itself sufficient reason to sustain the validity of the act in question. I strongly adhere to the rule that every reasonable doubt must be resolved in favor of a statute and not against it and that *it should not be adjudged invalid unless its violation of the constitution is clear, complete, and unmistakable.*"



## Congress Does Have Constitutional Power to Raise a Peace-Time Army by Conscription.

Although this question is prematurely raised by appellant, there is no doubt that Congress does have the power to raise a peace time army by conscription. The cases hereinafter cited will also be of interest to the Court in connection with one of the principal questions involved in this appeal, that is, whether or not enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 violate appellant's freedom of religion under the First Amendment.

As early as 1890 the Supreme Court stated in *In re Grimley*, 137 U. S. 147:

"The government has the right to military service of all of its able-bodied citizens and may, when emergency arises, justly exact that service from all."

In *Burroughs v. Peyton* (1864), 16 Gratt (Va.) 470, it is said:

*"The power of coercing the citizen to render military service is indeed a transcendent power, in the hands of any government; but so far from being inconsistent with liberty, it is essential to its preservation. A nation cannot foresee the dangers to which it may be exposed; it must therefore grant to its government a power equal to every possible emergency; and this can only be done by giving to it the control of its whole military strength. The danger that the power may be abused cannot render it proper to withhold it; for it is necessary to the national life."*

Also see:

*United States v. Tarble* (1871), 13 Wall. (U. S.) 397;

*Lanahan v. Birge* (1862), 30 Conn. 438;

*Kneedler v. Lane* (1863), 45 Pa. 238.



In *United States v. Garst*, 39 Fed. Supp. 367, the Court related certain historic events to further support this principle of law:

“The legislative history of the Constitution itself disposes of the contention by the defendant in this case that the power ‘To raise and support Armies’ is limited to volunteer service in such armies in peace time.

“On May 29, 1790, the Rhode Island Convention proposed an amendment to the Constitution specifically providing: ‘That no person shall be compelled to do military service otherwise than by voluntary enlistment, except in cases of general invasion; anything in the second paragraph of the Sixth Article of the Constitution or any law made under the Constitution to the contrary notwithstanding’ 1 Elliot’s Debates, p. 336.

“This proposed amendment indicates conclusively that it was universally accepted at the time that the Constitution definitely empowered Congress ‘to raise and support armies’ by conscription in time of peace. The legislative history discloses that the Rhode Island Convention’s amendment limiting conscription to cases of general invasion was never acted upon. This certainly demonstrates that the framers of the Constitution intended that the power ‘To raise and support Armies’ should include conscription in time of peace.

“The following excerpt from an article by Alexander Hamilton in *The Federalist* (No. XXIV), written at the time that the proposal was made to limit the congressional power ‘To raise and support Armies,’ is highly significant and enlightening as to the interpretation and intendment of the Constitution makers on the subject of the disputed provision. Said Alexander Hamilton: ‘If to obviate this conse-

quence' (the danger of usurpation of power by a combination of the executive and legislative in time of peace), 'it should be resolved to extend the prohibition to the raising of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen—that of a nation incapacitated by its Constitution before it was actually invaded. As the ceremony of a formal declaration of war has of late fallen into disuse, the presence of any enemy within our territories must be waited for, as the legal warrant to the Government to begin its levies of men for the protection of the state. We must receive the blow before we could even prepare to return it."

The above quoted excerpt from the article by Alexander Hamilton in *The Federalist* was also set forth in *United States v. Lambert*, 123 F. 2d 395, 3d Cir. (1941).

In *United States v. Cornell*, 36 Fed. Supp. 81, at page 83, the Court reiterated the holdings of the earlier decisions:

"Our national history and court decisions uniformly have recognized the existence of the power of Congress under the Constitution to compel military service of a citizen in case of need, when it so declares, whether in peace time or war time, and to make preparation, if Congress declares that it is imperative or necessary, or that an emergency exists requiring the raising and support of an army.

\* \* \* \* \*

It is not within the province of the Courts to say that Congress was mistaken in saying that it was imperative to increase the military forces of the United States, for as has been said, that under the Constitution, Congress has exclusive power to say when and under what circumstances a situation exists,

that it is imperative to increase and train the personnel of the armed forces of the United States and requiring the citizens to render military service in case of need.”

Also see *United States v. Herling*, 120 F. 2d 236, 2nd Cir. (1941), where the Court held that the Selective Training and Service Act of 1940 and the regulations thereunder were valid although there had been no formal declaration of war.

**Enforced Compliance With the Registration Provisions of the Selective Training and Service Act of 1948 Does Not Violate Appellant's Freedom of Religion Under the First Amendment.**

Just as the United States clearly possesses the power to raise an army in peace time by conscription, it possesses the constitutional power to require registration of its male citizens during peacetime under the provisions of the Selective Training and Service Act of 1948. The nondiscriminatory exercise of such power does not constitute an abridgment of the freedom of religion of any person. In *Local Draft Board No. 1 v. Connors*, 124 F. 2d 388, 9th Cir. (1941), the Court held:

“It is within the congressional power to call everyone to the colors. No one under the jurisdiction of the sovereign nation, whatever his or her status, is exempt except by the grace of the government.”

Since it is within the power of Congress to call everyone to the colors without exemption, there is no basis in reason or policy for this Court to hold that Congress does not have the power to require that its male citizens merely register without exemption under the Selective Training

and Service Act of 1948. In *United States v. Rappeport*, 36 Fed. Supp. 915, the Court held:

“Accordingly Congress undoubtedly has the power to seek information through registration or otherwise in peacetime in order to be prepared for the intelligent exercise of its power to raise armies by conscription \* \* \*”

See also *Stone v. Christensen*, 36 Fed. Supp. 739, at 743, where the Selective Training and Service Act provisions for peacetime registration were held to be constitutional. The Court stated succinctly:

“In this present period, the wars undeclared under the law of nations, the disregard of international convention, the hostile concentrations cloaked by manifestos of pacific intention, the elimination of time and distance as ponderable factors, the lightning strokes of modern arms are actualities over which the words ‘at peace’ cannot be permitted to tyrannize in making judgments. \* \* \* but whether events prove we are at war, in a state of war, or clinging to an equivocal neutrality, *a failure to register manpower of the country would be a failure to provide for ‘the common defense.’*” (Italics supplied.)

In *United States v. Lambert, supra*, 123 F. 2d 395, 3d Cir. (1941), the Court held that the power of Congress to compel registration for military service and training is not limited to actions taken after a formal declaration of war.

In *United States v. Brooks*, 54 Fed. Supp. 995 (1944), at page 996, the Court made the following comment:

“Respect for the integrity of conscience is unquestionably firmly embedded in our constitutional



foundations. Reason finds it difficult to comprehend the appeal for the shelter of the Constitution by one who is unwilling to defend the Constitution. Logic looks askance at one who, asserting his right to freedom of religion, refuses to have any share in resisting an enemy who has declared war upon us and whose first act in every land he has invaded has been to abolish freedom of religion.”

The Court went on to quote from *West Virginia Board of Education v. Barnette*, 319 U. S. 624, as follows:

“No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are \* \* \* imperatively necessary to protect society as a whole from grave and pressing imminent dangers. \* \* \*”

In *Hamilton v. Regents, supra*, 293 U. S. 245, at pages 267-268, the Court remarked as follows:

“Never in our history has the notion been accepted, or even it is believed, advanced, that acts \* \* \* indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. \* \* \* Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as immoral. The right of private judgment has never yet been exalted above the powers



and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.”

See also:

*In re Summers*, 325 U. S. 561, 571 (1945);

*United States v. Moriarity*, 106 Fed. 886, 891-892 (Cir. Ct., N. Y., 1901).

In *Hopper v. United States*, 142 F. 2d 181, 9th Cir. (1943), the Court commented:

“A few points remain to be noticed. Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime. Also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection. Selective Draft Law Cases (*Arver v. United States*), 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349, L. R. A. 1918 C, 361, Ann. Cas. 1918B, 856;”

In *Bronemann v. United States*, 138 F. 2d 333, 8th Cir. (1943), it was held:

“For the whole class of persons the procedure set up by the Act provides to the individual the full protection of due process of law throughout the proceedings by which his general liability to military service becomes a fixed obligation through his selection and induction into such service.”

Further, in *Rase v. United States*, 129 F. 2d 204, 6th Cir. (1942), the Court stated:

“The Constitution grants no immunity from military service because of religious convictions or activities. Immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objection and Holy calling.”

In *United States v. Newman*, 44 Fed. Supp. 817 (1942), it was again held:

“The grant of exemption to conscientious objectors is not a matter of constitutional right but wholly an act of grace upon the part of Congress.”

### **The Registration Provisions of the Selective Training and Service Act of 1948 Are Separable From the Other Provisions of Said Act.**

It is clear that the registration provisions of the Selective Training and Service Act of 1948 are separable from the other provisions of this Act.

In *Stone v. Christensen*, *supra*, 36 Fed. Supp. 739, Harry W. Stone brought a complaint against the Chief Registrar for the draft at Monmouth, Oregon, for a judgment declaring that the plaintiff did not have to register under the terms of the Selective Training and Service Act of 1940, and to restrain prosecution of the plaintiff for failure to register. The grounds urged for relief were that the registration would subject Stone to military training and he would thereby be deprived of liberty and property without due process of law and that he would undergo involuntary servitude in derogation of the Federal Constitution. However, the Court held:

“The allegations of the petition do not by inference suggest that plaintiff is threatened with service in the

army or in any way, except as a result of registration. But he has not registered. If he had registered he would not be subjected to military law nor liable to courtmartial until after induction, which includes swearing allegiance. Prior to that time he is still entitled to protection of any rights he may have by the civil tribunals. This circumstance differentiates the case from those arising under the Selective Service Act of 1917, 50 U. S. C. A. Appendix, §201 *et seq.*, where an eligible individual, whether registered or not, could be subjected to military law by the sending of an order for him to report. *No allegation of damage or unconstitutionality can therefore be properly based upon any fact except the liability to register.* According to the express terms of the law under consideration, the clauses thereof are severable. The validity of no one provision depends upon another.” (Italics supplied.)

In *United States v. Rappeport*, *supra*, 36 Fed. Supp. 915, the Court also stated that the registration provisions of the Selective Training and Service Act of 1940 were separable:

“Section 14(b) of the statute, \* \* \* expressly provides that if any provision of the Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby. *This creates a presumption of separability of the provisions of the Act* and indicates that Congress intended that valid

portions of the statute are to be effective in spite of the invalidity of other provisions thereof."

\* \* \* \* \*

"The defendant's contention that by submitting to the registration they would be held to have subjected themselves to all the provisions of the Act and to have waived their right to assert the invalidity of the other provisions of the Act cannot be sustained. The registration provision is so independent of the other sections of the Act that *it may be considered as though it is a separate statute*, submission to which does not affect the right to challenge the constitutionality of the other sections." (Italics supplied.)

As set forth above, the registration provisions of the Selective Training and Service Act of 1940 were separable because the validity of no one provision depended upon another by the terms of the Act itself. The present Act of 1948 contains a similar section [Sec. 465(c)].

In *United States v. Sugar*, 243 Fed. 423, the Court stated with regard to the Conscription Act of 1917:

"It is therefore unnecessary to consider the questions whether \* \* \* these defendants, charged as they are with a crime growing out of a refusal to register under the act, are entitled to invoke in their defense the unconstitutionality of an entirely separate and distinct portion of the act, having no relation to the provision requiring registration. This objection is clearly untenable and must be overruled."



**The Selective Training and Service Act of 1948 Does Not Abridge Freedom of Religion in Violation of the First Amendment by Conferring the Privilege of Exemption Only Upon Those Conscientious Objectors Who Believe in a Supreme Being (50 U. S. C. Appendix, Section 456(j)).**

Since the registration provisions are separable from the other provisions of the Selective Training and Service Act of 1948, appellant now has no standing to challenge the constitutional validity of either the exemption or conscription provisions of the Act. Further, the provision in the Selective Training and Service Act of 1948 which provides that no person who by reason of religious training and belief is conscientiously opposed to participation in war in any form shall be subject to combatant training and service in the armed forces of the United States, and that religious training and belief in this connection means an individual's belief in relation to a Supreme Being, does not abridge freedom of religion in violation of the First Amendment.

In the *Selective Draft Law Cases (Arver v. U. S.)*, 245 U. S. 366, the Court had under consideration the draft law of 1917. This Act exempted from subjection to the draft members of *certain enumerated religious sects* whose tenets excluded the moral right to engage in war. At pages 389 to 390 the Court stated:

“And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant



to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.”

The Selective Training and Service Act of 1940 included an exemption from military service by reason of religious training and belief. There was confusion under this exemption clause as to whether purely philosophical and moral beliefs would be grounds for exemption under that provision.

In *United States v. Kauten*, 133 F. 2d 703, 2d Cir. (1943), the Court held that conscientious objection to participation in any war, under any circumstances could be the basis of exemption under that Act. The Court said:

“The latter, we think, may be justly regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent as to what has always been thought a religious impulse.”

Subsequently, in *United States v. Badt*, 141 F. 2d 845, 2d Cir. (1944), the Court followed the *Kauten* case. However, in 1946, in *Berman v. United States*, 156 F. 2d 377 (Petition for Writ of Certiorari to Court of Appeals for Ninth Circuit denied 329 U. S. 795, Rehearing denied 329 U. S. 833), this Court of Appeals held:

“\* \* \* the expression ‘by reason of religious training and belief’ is plain language, and was written into the statute for the specific purpose of distinguish-

ing between the conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.

\* \* \* However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of diety cannot be said to be religion in the sense of that term as it is used in the statute."

When the Selective Training and Service Act of 1948 was drafted, its language followed the holding of this circuit in the *Berman* case in that it defined religious training and belief as meaning "an individual's belief in the relation to a Supreme Being involving duties superior to those arising from any human relation but does not include essentially political, sociologocial or philosophical views or a merely personal moral code."

### Conclusion.

In conclusion, it is respectfully submitted that:

- (1) Congress does have constitutional power to raise a peacetime army by conscription;
- (2) Enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 does not violate appellant's freedom of religion under the First Amendment;
- (3) The registration provisions of the Selective Training and Service Act of 1948 are separable from the other

provisions of said Act and therefore appellant has no standing to challenge the constitutional validity of either the exemption or conscription provisions of the Act; and

(4) Further, the Selective Training and Service Act of 1948 does not abridge freedom of religion in violation of the First Amendment by conferring the privilege of exemption only upon those conscientious objectors who believe in a Supreme Being.

Respectfully submitted,

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No. 12283

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United States  
Court of Appeals  
For the Ninth Circuit.

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DOROTHY RAY HEALEY, MAX APPELMAN,  
ALVIN ABRAM AVERBUCK, ELVADOR  
G. GREENFIELD, and HORACE MORTON  
NEWMAN, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the Southern District of California  
Central Division

**FILED**

NOV 25 1949

**PAUL P. O'BRIEN, CLERK**





No. 12283

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United States  
Court of Appeals  
For the Ninth Circuit.

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\* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

20743

September, 1948, Term

## GRAND JURY PRESENTMENT

In the Matter of:

WITNESS MAX APPELMAN

## CRIMINAL CONTEMPT

Section 401, Title 18, U.S. Code

The Grand Jury of the United States of America for the Southern District of California, Central Division, September Term, 1948, upon their oath present:

1. That on or about the 25th day of October, 1948, the Grand Jury for the United States of America duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September, 1948, Term, undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U.S. Code, Revised Title 18 U.S. Code, Section 1001, and other criminal laws of the United States. In pursuance of such inquiry,

it became necessary for said Grand Jury to inquire into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization.

Further the Grand Jury presents:

2. That Max Appelman was subpoenaed and appeared as a witness before said Grand Jury and on June 14, 1949, then and there refused to answer certain questions propounded to him, he claiming that the answers thereto may tend to incriminate him. [2]

3. Thereafter he appeared before the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on the 14th day of June, 1949, in open court where the claim of privilege of the witness Max Appelman was challenged by the Government. The Court then heard the questions propounded to the witness, and the answers he made to said questions.

4. The Court found that there was no present danger of such tendency to incriminate the said witness Max Appelman, and on June 14, 1949, ordered him to return before the Grand Jury on said June 14, 1949, and answer the said questions (upon which he claimed his aforesaid privilege), namely:

(1) "Do you know that Dorothy Healey is the organizational secretary of the Los Angeles County Committee of the Communist Party?

(2) "Do you know who the chairman of the Los Angeles County Communist Party is?



(3) "Do you know who the membership director of the Los Angeles County Committee of the Communist Party is?"

(4) "Do you know who the financial director of the Los Angeles County Committee of the Communist Party is?"

(5) "Do you know anything about the sections?"

(6) "Can you tell us whether each section has an organizer?"

(7) "Can you tell us the names of any of the section organizers of the Los Angeles County Communist Party?"

(8) "Can you tell us whether each section has a membership director?"

(9) "Where have you used that name (Matt Pelman)?"

(10) "Have you ever been to their offices in Los Angeles? (The Los Angeles County Committee of the Communist Party.)"

(11) "Did you know who was in charge when you were living here? (The Los Angeles County Committee of the Communist Party.)"

5. Further the Grand Jury presents that on the 14th day of June, 1949, the said Max Appelman was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection [3] with the matters heretofore described, and again each of the said questions hereinabove listed which the Court ordered him to answer, were asked of the said witness, who then persistently refused to answer said questions,

stating categorically that he refused to answer each of the questions on the ground that it would incriminate him.

6. That the said Grand Jurors, upon their oaths, present:

That the said Max Appelman, a witness before this Grand Jury, has given an obstructive, evasive and contumacious answer to each of the said questions propounded to him before said Grand Jury; that each of said questions was proper and material to the Grand Jury's inquiry and that no one or all of said questions would tend to incriminate the said witness of a violation of a federal offense; that the answer to each of said questions operated to shut off and block the instant inquiry, and block the search for truth; and the said witness has wilfully, deliberately and contumaciously obstructed the investigation of said Grand Jury in the matter hereinabove set forth by failing and refusing to answer each of the aforesaid proper and material questions put to him in the proceeding before the Grand Jury, which the Court ordered him to answer.

The Grand Jury therefore respectfully prays the Court to invoke its punitive power against said witness to maintain the proper functioning of the court and the Grand Jury and that it exercise such powers

so that the court's act may serve as a deterrant on other recalcitrant witnesses.

/s/ R. B. AHLWEDE,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

/s/ M. H. GOLDSCHNID,

Special Assistant to the  
Attorney General.

[Endorsed]: Filed June 14, 1949. [4]

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In the United States District Court for the Southern District of California, Central Division

20744

September, 1948, Term

## GRAND JURY PRESENTMENT

In the Matter of:

WITNESS ALVIN ABRAM AVERBUCK

## CRIMINAL CONTEMPT

Section 401, Title 18, U.S. Code

The Grand Jury of the United States of America for the Southern District of California, Central Division, September Term, 1948, upon their oath present:

1. That on or about the 25th day of October, 1948, the Grand Jury for the United States of

America duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September, 1948, Term, undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U.S. Code, Revised Title 18 U.S. Code, Section 1001, and other criminal laws of the United States. In pursuance of such inquiry, it became necessary for said Grand Jury to inquire into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization.

Further the Grand Jury presents:

2. That Alvin Abram Averbuck was subpoenaed and appeared as a witness before said Grand Jury and on May 26, 1949, then and there refused to answer certain questions propounded to him, he claiming that the answers thereto may tend to incriminate him. [5]

3. Thereafter he appeared before the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on the 9th day of June, 1949, in open court where the claim of privilege of the witness Alvin Abram Averbuck was challenged by the Government. The Court then heard the questions propounded to the witness, and

the answers he made to said questions. Thereafter, the said witness was offered an opportunity to be heard by the Court, privately in chambers as to how his privilege against self-incrimination would be violated by answering said questions, but the witness did not avail himself of the opportunity.

4. The Court found that there was no present danger of such tendency to incriminate the said witness Alvin Abram Averbuck, and on June 11, 1949, ordered him to return before the Grand Jury on June 14, 1949, and answer the said questions (upon which he claimed his aforesaid privilege), namely:

(1) What name is on the door (at 124 W. 6th St.)?

(2) Do you know Mrs. Dorothy Healey?

(3) Mr. Averbuck, do you know who has the books and records of the Los Angeles County Communist Party?

(4) Now, do you know how many divisions of the Los Angeles County Communist Party there are?

(5) Do you know the names of any of the chairmen of any of the divisions of the Los Angeles County Communist Party?

(6) Do you know the names of the membership or social organizers of any of the divisions of the Los Angeles County Communist Party?

(7) Do you know the names of the financial organizers or financial directors of any of the divisions of the Los Angeles County Communist Party?



(8) Do you know the names of the officials of any of the divisions of the Los Angeles County Communist Party that have the books and records of that division of the Communist Party? [6]

(9) Did you ever see Mrs. Dorothy Healey with any of the books or records of the Los Angeles County Communist Party?

(10) What did you say your occupation was? Organizer.

For whom?

5. Further the Grand Jury presents that on the 14th day of June, 1949, the said Alvin Abram Averbuck was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection with the matters heretofore described, and again each of the said questions hereinabove listed which the Court ordered him to answer, were asked of the said witness, who then persistently refused to answer said questions, stating categorically that he refused to answer each of the questions on the ground that it would incriminate him.

6. That the said Grand Jurors, upon their oaths, present:

That the said Alvin Abram Averbuck, a witness before this Grand Jury, has given an obstructive, evasive and contumacious answer to each of the said questions propounded to him before said Grand Jury; that each of said questions was proper and material to the Grand Jury's inquiry and that no one or all of said questions would tend to incriminate the said witness of a violation of a federal offense; that the answer to each of said questions

operated to shut off and block the instant inquiry, and block the search for truth; and the said witness has wilfully, deliberately and contumaciously obstructed the investigation of said Grand Jury in the matter hereinabove set forth by failing and refusing to answer each of the aforesaid proper and material questions put to him in the proceeding before the Grand Jury, which the Court ordered him to answer.

The Grand Jury therefore respectfully prays the Court to invoke its punitive power against said witness to maintain the proper functioning of the court and the Grand Jury and that it exercise such powers so that the court's act may serve as a deterrant on other recalcitrant witnesses.

/s/ R. B. AHLWEDE,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

/s/ M. H. GOLDSCHNID,

Special Assistant to the  
Attorney General.

[Endorsed]: Filed June 14, 1949. [8]

In the United States District Court for the Southern District of California, Central Division

20745

September, 1948, Term

GRAND JURY PRESENTMENT

In the Matter of:

WITNESS ELVADOR G. GREENFIELD

CRIMINAL CONTEMPT

Section 401, Title 18, U.S. Code

The Grand Jury of the United States of America for the Southern District of California, Central Division, September Term, 1948, upon their oath present:

1. That on or about the 25th day of October, 1948, the Grand Jury for the United States of America duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September, 1948, Term, undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U.S. Code, Revised Title 18 U.S. Code, Section 1001, and other criminal laws of the United States. In pursuance of such inquiry, it became necessary for said Grand Jury to inquire

into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization.

Further the Grand Jury presents:

2. That Elvador G. Greenfield was subpoenaed and appeared as a witness before said Grand Jury and on May 26, 1949, then and there refused to answer certain questions propounded to him, he claiming that the answers thereto may tend to incriminate him. [9]

3. Thereafter he appeared before the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on the 9th day of June 1949, in open court where the claim of privilege of the witness Elvador G. Greenfield was challenged by the Government. The Court then heard the questions propounded to the witness, and the answers he made to said questions. Thereafter, the said witness was offered an opportunity to be heard by the Court, privately in chambers, as to how his privilege against self-incrimination would be violated by answering said questions, but the witness did not avail himself of the opportunity.

4. The Court found that there was no present danger of such tendency to incriminate the said witness Elvador G. Greenfield, and on June 11, 1949, ordered him to return before the Grand Jury on June 14, 1949, and answer the said questions (upon which he claimed his aforesaid privilege), namely:

(1) "Now, do you know who has the books and

records of the Los Angeles County Communist Party?

(2) "Was that the first time you ever saw her?  
(Dorothy Healey)

(3) "Does she have the books and records of the Los Angeles County Party, do you know?

(4) (Same question as #1)

(5) "Mr. Greenfield, do you know whether or not the Los Angeles County Communist Party is divided up into divisions?

(6) "Can you tell us how many divisions there are?

(7) "Will you tell us whether or not each division of the Communist Party of Los Angeles County keeps books of the membership of that division?

(8) "Will you tell us the names of the chairmen or organizers of these divisions?

(9) "Will you tell us whether or not these divisions each have a membership or social director?

(10) "Mr. Greenfield, we want to know the names of these people that hold these offices.

(11) "Well, does each division have a financial director? If so, will you give us their names?" [10]

5. Further the Grand Jury presents that on the 14th day of June, 1949, the said Elvador G. Greenfield was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection with the matters heretofore described, and again each of the said questions hereinabove listed which the Court ordered him to answer, were asked of the said witness, who then



persistently refused to answer said questions, stating categorically that he refused to answer each of the questions on the ground that it would incriminate him.

6. That the said Grand Jurors, upon their oaths, present:

That the said Elvador G. Greenfield, a witness before this Grand Jury, has given an obstructive, evasive and contumacious answer to each of the said questions propounded to him before said Grand Jury; that each of said questions was proper and material to the Grand Jury's inquiry and that no one or all of said questions would tend to incriminate the said witness of a violation of a federal offense; that the answer to each of said questions operated to shut off and block the instant inquiry, and block the search for truth; and the said witness has wilfully, deliberately and contumaciously obstructed the investigation of said Grand Jury in the matter hereinabove set forth by failing and refusing to answer each of the aforesaid proper and material questions put to him in the proceeding before the Grand Jury, which the Court ordered him to answer.

The Grand Jury therefore respectfully prays the Court to invoke its punitive power against said witness to maintain the proper functioning of the court and the Grand Jury and that it exercise such powers

so that the court's act may serve as a deterrant on other recalcitrant witnesses.

/s/ R. B. AHLSEWEDE,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

/s/ M. H. GOLDSCHNEIN,

Special Assistant to the  
Attorney General.

[Endorsed]: Filed June 14, 1949. [11]

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In the United States District Court for the Southern District of California, Central Division

20746

September, 1948, Term

GRAND JURY PRESENTMENT

In the Matter of:

WITNESS DOROTHY RAY HEALEY

CRIMINAL CONTEMPT

Section 401, Title 18, U.S. Code

The Grand Jury of the United States of America for the Southern District of California, Central Division, September Term, 1948, upon their oath present:

1. That on or about the 25th day of October, 1948, the Grand Jury for the United States of

America duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September, 1948, Term, undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U.S. Code, Revised Title 18 U.S. Code, Section 1001, and other criminal laws of the United States. In pursuance of such inquiry, it became necessary for said Grand Jury to inquire into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization.

Further the Grand Jury presents:

2. That Dorothy Ray Healey was subpoenaed and appeared as a witness before said Grand Jury and on May 26, 1949, then and there refused to answer certain questions propounded to her, she claiming that the answers thereto may tend to incriminate her. [12]

3. Thereafter she appeared before the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on the 9th day of June, 1949, in open court where the claim of privilege of the witness Dorothy Ray Healey was challenged by the Government. The Court then heard the questions propounded to the witness, and

the answers she made to said questions. Thereafter, the said witness was offered an opportunity to be heard by the Court, privately in chambers as to how her privilege against self-incrimination would be violated by answering said questions, but the witness did not avail herself of the opportunity.

4. The Court found that there was no present danger of such tendency to incriminate the said witness Dorothy Ray Healey, and on June 11, 1949, ordered her to return before the Grand Jury on June 14, 1949, and answer the said questions (upon which she claimed her aforesaid privilege), namely:

(1) Will you tell us who you are organizer for?

(2) Now, Mrs. Healey, do you know who has the books and records of the Los Angeles County Communist Party?

(3) Can you tell us, Mrs. Healey, whether or not the Los Angeles County Communist Party has a chairman?

(4) Can you tell us whether or not it has an organizational secretary?

(5) Can you tell us whether or not it has an education director?

(6) Can you tell us whether or not it has a labor director?

(7) Can you tell us whether or not the membership or social director would have a list of the members of the Los Angeles County Communist Party?

(8) Can you tell us whether or not they have a financial director?

(9) Can you tell us whether or not the financial

director would have a record of the dues paid by the members of the Los Angeles County Communist Party? [13]

(10) Can you tell us who has the record showing the dues paid by the membership of the Los Angeles County Communist Party?

(11) Now, Mrs. Healey, can you tell us the name of anyone who can give us that information I just asked you?

(12) But that information is available, is it not?

(13) Can you tell us how many divisions there are in the Los Angeles or the Los Angeles County Communist Party?

(14) Can you tell us how many sections there are in the divisions?

(15) Can you tell us how many clubs there are?

(16) Can you tell us how many squads there are?

(17) Mrs. Healey, can you tell us who is chairman of the eastern division of the Los Angeles County Communist Party?

(18) Can you tell us who is the chairman of the midtown division of the Los Angeles County Communist Party?

(19) Can you tell us who is the head of the southern division of the Los Angeles County Communist Party?

(20) Can you tell us who is the head of the western division of the Los Angeles County Communist Party?

(21) Can you tell us who is the head of the



youth division of the Los Angeles County Communist Party?

(22) Can you tell us who is the head of the student section of that youth division?

(23) Mrs. Healey, each division has a chairman, does it not?

(24) Or sometimes called an organizer?

(25) Does each division have an organizational secretary?

(26) Does each have a membership or social secretary?

(27) Does each have a membership or social director?

(28) Does the membership or social director of each division have a list of the membership of that division?

(29) Does each division have a financial director?

(30) Do not the membership director and the financial director have the books and records of the Los Angeles County Communist Party? [14]

(31) Same as question No. 2.

(32) Now, that statement with reference to Mrs. Dorothy Ray Healey, the organizational secretary of the Los Angeles Communist Party, is that designation correct with reference to you?

(33) What is your business address?

(34) You are in charge of those records, are you not?

No.

Who is?

(35) Are these records in the place of business where you work?

(36) Do you know who does have control over the records?

5. Further the Grand Jury presents that on the 14th day of June, 1949, the said Dorothy Ray Healey was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection with the matters heretofore described, and again each of the said questions hereinabove listed which the Court ordered her to answer, were asked of the said witness, who then persistently refused to answer said questions, stating categorically that she refused to answer each of the questions on the ground that it would incriminate her.

6. That the said Grand Jurors, upon their oaths, present:

That the said Dorothy Ray Healey, a witness before this Grand Jury, has given an obstructive, evasive and contumacious answer to each of the said questions propounded to her before said Grand Jury; that each of said questions was proper and material to the Grand Jury's inquiry and that no one or all of said questions would tend to incriminate the said witness of a violation of a federal offense; that the answer to each of said questions operated to shut off and block the instant inquiry, and block the search for truth; and the said witness has wilfully, deliberately and contumaciously obstructed the investigation of said Grand Jury in

the matter hereinabove set forth by failing and refusing to answer each of the aforesaid proper and material questions put to her in the proceeding before the Grand Jury, which the Court ordered her to answer. [15]

The Grand Jury therefore respectfully prays the Court to invoke its punitive power against said witness to maintain the proper functioning of the court and the Grand Jury and that it exercise such powers so that the court's act may serve as a deterrant on other recalcitrant witnesses.

/s/ R. B. AHLWEDE,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

/s/ M. H. GOLDSCHNID,

Special Assistant to the  
Attorney General.

[Endorsed]: Filed June 14, 1949. [16]

In the United States District Court for the  
Southern District of California, Central Division

20747

September, 1948, Term

## GRAND JURY PRESENTMENT

In the Matter of:

WITNESS HORACE MORTON NEWMAN, Jr.

## CRIMINAL CONTEMPT

Section 401, Title 18, U. S. Code

The Grand Jury of the United States of America for the Southern District of California, Central Division, September Term, 1948, upon their oath present:

1. That on or about the 25th day of October, 1948, the Grand Jury for the United States of America, duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September, 1948,, Term, undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U. S. Code, Revised Title 18 U. S. Code, Section 1001, and other criminal laws of the United States. In pursuance of such inquiry, it became necessary for said Grand

Jury to inquire into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization.

Further the Grand Jury presents:

2. That Horace Morton Newman, Jr., was subpoenaed and appeared as a witness before said Grand Jury and on April 21, 1949 and May 26, 1949, then and there refused to answer certain questions propounded to him, he claiming that the answers thereto may tend to incriminate him. [17]

3. Thereafter he appeared before the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on the 9th day of June, 1949, in open court where the claim of privilege of the witness Horace Morton Newman, Jr., was challenged by the Government. The Court then heard the questions propounded to the witness, and the answers he made to said questions. Thereafter, the said witness was offered an opportunity to be heard by the Court, privately in chambers as to how his privilege against self-incrimination would be violated by answering said questions, but the witness did not avail himself of the opportunity.

4. The Court found that there was no present danger of such tendency to incriminate the said witness Horace Morton Newman, Jr., and on June 11, 1949, ordered him to return before the Grand Jury on June 14, 1949, and answer the said ques-



tions (upon which he claimed his aforesaid privilege), namely:

(1) "Do you know Dorothy Healey?

(2) "Do you know her office address?

(3) "Do you know her business or occupation?

(4) "Now, what is your business address?

(5) "Who are you educational director for?

(6) "Do you know who the financial director is of the eastern division of the Los Angeles County Communist Party?

(7) "Do you know who the membership or social director is of the eastern division of the Los Angeles County Communist Party?

(8) "Now, who is the chairman of the Los Angeles County Communist Party?

(9) "Who is the organizational secretary of the Los Angeles County Communist Party?

(10) "Now, do you know whether or not the Los Angeles County Communist Party has a labor director?

(10a) "Do you know whether or not they have a membership or social director?

(11) "Do you know whether or not the membership or social director has a list of the membership of the Los Angeles County Communist Party? [18]

(12) "Do you know whether or not the Los Angeles County Communist Party has a financial director?

(13) "Do you know whether or not the financial director keeps an account of the dues collected from the members of the Los Angeles County Communist Party?

(14) "Do you report to anybody who you see?"

(15) "Do you know Dorothy Healey is the organizational secretary of the Communist Party of Los Angeles County?"

(16) "Do you know whether Dorothy Healey has in her possession or under her control any books and records of the Communist Party of Los Angeles County?"

5. Further the Grand Jury presents that on the 14th day of June, 1949, the said Horace Morton Newman, Jr., was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection with the matters heretofore described, and again each of the said questions hereinabove listed which the Court ordered him to answer, were asked of the said witness, who then persistently refused to answer said questions, stating categorically that he refused to answer each of the questions on the ground it would incriminate him.

6. That the said Grand Jurors, upon their oaths, present:

That the said Horace Morton Newman, Jr., a witness before this Grand Jury, has given an obstructive, evasive and contumacious answer to each of the said questions propounded to him before said Grand Jury; that each of said questions was proper and material to the Grand Jury's inquiry and that no one or all of said questions would tend to incriminate the said witness of a violation of a federal offense; that the answer to each of said questions

operated to shut off and block the instant inquiry, and block the search for truth; and the said witness has wilfully, deliberately and contumaciously obstructed the investigation of said Grand Jury in the matter hereinabove set forth by failing and refusing to answer each of the aforesaid proper and material questions put to him in the proceeding before the Grand Jury, which the Court ordered him to [19] answer.

The Grand Jury therefore respectfully prays the Court to invoke its punitive power against said witness to maintain the proper functioning of the court and the Grand Jury and that it exercise such powers so that the court's act may serve as a deterrent on other recalcitrant witnesses.

/s/ R. B. AHLSEWEDE,

Foreman.

/s/ JAMES M. CARTER,

United States Attorney.

/s/ M. H. GOLDSCHNEIN,

Special Assistant to the  
Attorney General.

[Endorsed]: Filed June 14, 1949. [20]

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At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los

Angeles on Tuesday the 14th day of June in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,  
District Judge.

U.S.A. vs. Max Appelman	No. 20,743-Cr.
U.S.A. vs. Alvin Abram Averbuck	No. 20,744-Cr.
U.S.A. vs. Elvador G. Greenfield	No. 20,745-Cr.
U.S.A. vs. Dorothy Ray Healey	No. 20,746-Cr.
U.S.A. vs. Horace Morton Newman, Jr.	No. 20,747-Cr.

(Same Order in Each Case:)

This cause coming before the Court; James M. Carter, U. S. Att'y, appearing as counsel for Gov't, together with Max H. Goldscheine, Spec. Ass't to Att'y Gen'l, and defendant being present with his attorneys Ben Margolis and John T. McTernan, Esqs.;

Attorney Carter informs the Court that the Grand Jury desires to present a Presentment to the Court of Criminal Contempt of defendant; whereupon, a copy of said Presentment is delivered to counsel for the defendant, and the defendant being now ready for arraignment and plea, defendant states his true name is as set forth in the Presentment, is informed of his constitutional rights to be represented by counsel and a trial by the Court, and Attorney Margolis thereupon waiving reading of the Presentment, defendant enters his plea of not guilty as charged.

Attorney Goldschein moves the Court that the trial of this case be set for June 16, 1949, 10 a.m., which motion is opposed by Attorney Margolis on the grounds that counsel have had no time to prepare for trial, and on the further grounds that briefs are due by June 22, 1949, in the cases of a similar character already on appeal.

The Court thereupon orders this cause set for trial June 23, 1949, 10 a.m., and that bond of defendant be exonerated, if bond is posted and on file, and thereupon fixes bond of defendant at \$4,000, and orders that defendant stand committed until said bond is posted. [21]

The Clerk of the Court, Edmund L. Smith, is hereby directed and ordered to remain in the Clerk's Office until 6:30 p.m. today, which is the extent of the time allowed defendant in which to post said bond. [22]

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At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 23rd day of June in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,  
District Judge.

U.S.A. vs. Max Appelman

No. 20,743-Cr.



U.S.A. vs. Alvin Abram Averbuck	No. 20,744-Cr.
U.S.A. vs. Elvador G. Greenfield	No. 20,745-Cr.
U.S.A. vs. Dorothy Ray Healey	No. 20,746-Cr.
U.S.A. vs. Horace Morton Newman, Jr.	No. 20,747-Cr.

For trial; James M. Carter, U. S. Att'y, and Max H. Goldscheim, Spec. Ass't to Att'y Gen'l, appearing as counsel for Gov't; Ben Margolis, Esq., appearing as counsel for defendants, who are present on bond;

E. L. Drummond is called, sworn, and testifies for Gov't. Gov't rests.

The Court takes judicial notice that the Grand Jury investigating the loyalty of certain Gov't employees has been ordered to continue its investigation by an order extending its term of service, also the proceedings had before it and the Court, and that the order was made directing the respondents, now defendants, to appear before the Grand Jury and give answer to certain questions asked by the Grand Jury on June 14, 1949.

On motion of Attorney Margolis, it is ordered that all previous proceedings had in connection with any of these witnesses, now defendants, before this Court, are deemed to be in evidence, including defensive material, rulings, and objections. At 11:05 a.m. court recesses.

At 11:21 a.m. court reconvenes herein and all being present as before, including defendants and counsel for both sides, Attorney Margolis offers a pamphlet entitled "100 Things You Should Know

About Communism in the U.S.A.” as defendants’ exhibit.

On the Court’s own motion, and there being no objections thereto, the Court orders that these causes are consolidated for purpose of this trial.

The Court, thereupon, orders the said exhibit marked Defendants’ Exhibit A for identification.

Attorney Margolis now offers Defendants’ Exhibit B in evidence, and it is ordered that the said exhibit be, and it is marked for identification.

Richard B. Hood is called, sworn, and testifies for defendants.

At 11:50 a.m. Court declares a recess to 2 p.m. At 2:05 p.m. court reconvenes herein and all being present as before, including defendants and counsel, Attorney Margolis informs the Court of the substance of the testimony of A. L. Wirin, were he called as a witness for the defendant, said Witness Wirin being to ill to be present, which offer is accepted by Attorney Carter with reservations to move to strike.

Attorney Margolis thereupon moves for admittance into evidence of Defendants’ Exhibit B for identification, which is objected to by Attorney Carter.

The Court, after due consideration of said exhibits, ordered Defendants’ Exhibit B admitted into evidence. Both sides rest.

Government waives opening argument. Attorney Margolis argues to the Court.

At 2:35 p.m. court recesses. At 2:47 p.m. court

reconvenes herein and all being present as before, including defendants and counsel, Attorney Margolis argues further. At 3:30 p.m. court recesses.

At 3:50 p.m. court reconvenes herein and all being present as before, including defendants and counsel, the Court orders these consolidated causes continued to 10 a.m., June 24, 1949, for further trial. [24]

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At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 24th day of June in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,  
District Judge.

U.S.A. vs. Max Appelman	No. 20,743-Cr.
U.S.A. vs. Alvin Abram Averbuck	No. 20,744-Cr.
U.S.A. vs. Elvador G. Greenfield	No. 20,745-Cr.
U.S.A. vs. Dorothy Ray Healey	No. 20,746-Cr.
U.S.A. vs. Horace Morton Newman, Jr.	No. 20,747-Cr.

For further trial; James M. Carter, U. S. Attorney, and Max H. Goldscheim, Spec. Ass't to Att'y Gen'l, appearing as counsel for Gov't; Ben Margolis, Esq., appearing as counsel for defendants,

who are all present on bond; at 10:32 a.m. court convenes in this case, and the Court informs counsel that it has had photostatic copies made of certain executive orders of the President of The United States of America, enumerating each one, and describing each for the purpose of the record.

Attorney Margolis resumes his argument in behalf of the defendants.

At 11:30 a.m. court recesses. At 11:50 a.m. court reconvenes herein, and all being present as before, including defendants and counsel for both sides, and, it appearing that Government counsel cannot conclude his argument before noon, at 11:55 a.m. Court declares a recess herein until 2 p.m.

At 2:15 p.m. court reconvenes herein, and all being present as before, including defendants and counsel for both sides, Attorney Goldschein argues in behalf of the Government. Attorney Margolis replies. Both sides rest.

Court orders this cause continued to June 28, 1949, 2 p.m., for further trial. [25]

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At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 28th day of June in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,  
District Judge.

U.S.A. vs. Max Appelman	No. 20,743-Cr.
U.S.A. vs. Alvin Abram Averbuck	No. 20,744-Cr.
U.S.A. vs. Elvador G. Greenfield	No. 20,745-Cr.
U.S.A. vs. Dorothy Ray Healey	No. 20,746-Cr.
U.S.A. vs. Horace Morton Newman, Jr.	No. 20,747-Cr.

(Same Order in Each Case:)

For further trial; James M. Carter, U. S. Att'y, and Max H. Goldscheine, Spec. Ass't to Att'y Gen'l, appearing as counsel for Gov't; Ben Margolis, Esq., appearing as counsel for defendants, who are present on bond;

The Court, after being fully advised in the premises herein, and after due consideration of the argument of counsel and the evidence adduced, both oral and documentary, finds the defendant guilty of contempt.

Max Appelman, defendant, makes a statement.

Attorney Margolis waives reference to Prob. Officer for investigation and report. Court pronounces judgment upon the said defendant, Max Appelman, as follows: \* \* \*

Attorney Margolis moves that bail be fixed pending appeal, and ruling is deferred thereon.

Alvin Abram Averbuck, defendant, makes a statement. Attorney Margolis waives reference to Prob. Officer for investigation and report. Court pronounces judgment upon Defendant Averbuck as follows: \* \* \*



Attorney Margolis moves for stay of execution of commitment for non-payment of fine and for fixing bail pending appeal. The Court denies said motion for stay of execution of commitment for non-payment of said fine and orders Defendant Averbuck committed. [25-a]

Elvador G. Greenfield, defendant, makes a statement. Attorney Margolis waives reference to Prob. Officer for investigation and report. Court pronounces judgment upon Defendant Greenfield as follows: \* \* \*

Attorney Margolis moves that bail be fixed pending appeal, and the Court denies the said motion for the present without prejudice to a renewal thereof.

At 4 p.m. court recesses. At 4:26 p.m. court reconvenes herein and all being present as before, including defendants; Attorney Margolis presents a receipt in payment of fine imposed upon Defendant Averbuck, following which

The Court thereupon orders Defendant Averbuck released from the custody of the U. S. Marshal.

Horace Morton Newman, Jr., defendant, makes a statement. Attorney Margolis waives reference to Prob. Officer for investigation and report. Court pronounces judgment upon Defendant Newman, Jr., as follows: \* \* \*

Attorney Margolis moves that bail be fixed pending appeal, and Court defers ruling thereon.

Dorothy Ray Healey, defendant, makes a statement. The Court makes a statement. Attorney

Margolis and Defendant Healey waive reference to Prob. Officer for investigation and report. Court pronounces judgment upon Defendant Healey as follows: \* \* \*

Attorney Margolis moves the Court to fix bail pending appeal, and Court denies said motion for the present without prejudice to its renewal.

At 5:10 p.m. court recesses for ten minutes. At 5:25 p.m. court reconvenes herein and all defendants being present, Attorney Margolis moves that bail be fixed for each defendant pending appeal, and Court denies said motion and orders each defendant forthwith committed to the custody of U. S. Marshal. [26]

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District Court of the United States for the  
Southern District of California, Central Division

No. 20743—Criminal

UNITED STATES OF AMERICA

vs.

MAX APPELMAN

### JUDGMENT AND COMMITMENT

On this 28th day of June, 1949, came the attorney for the government and the defendant appeared in person and by counsel, Ben Margolis, Esq., and the Court having previously taken the matter under submission, did find the defendant guilty of contempt in refusing to answer each and any and

every one of the questions set forth in the presentment; now, therefore,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of criminal contempt in violation of Section 401, Title 18, U. S. Code, for the defendant's refusal to answer each and any and every and all of the questions set forth in the Grand Jury presentment, said violation being as charged in the Grand Jury presentment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year in an institution of the type to be selected by the Attorney General.

It Is Adjudged that the bond of the defendant be, and it hereby is, exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed June 28, 1949. [27]

District Court of the United States for the  
Southern District of California, Central Division

No. 20744—Criminal

UNITED STATES OF AMERICA

vs.

ALVIN ABRAM AVERBUCK

JUDGMENT AND COMMITMENT

On this 28th day of June, 1949, came the attorney for the government and defendant appeared in person and by counsel, Ben Margolis, Esq., and the Court having previously taken the matter under submission, did find the defendant guilty of contempt in refusing to answer each and any and every one of the questions set forth in the presentment; now, therefore,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of criminal contempt in violation of Section 401, Title 18, U. S. Code, for the defendant's refusal to answer each and any and every and all of the questions set forth in the Grand Jury presentment, said violation being as charged in the Grand Jury presentment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby ordered to pay a fine unto the United States of America in the sum of \$10.00, and stand committed until paid.

It Is Adjudged that the bond of the defendant be, and it hereby is, exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ PEIRSON M. HALL,

United States District Judge.

/s/ EDMUND L. SMITH,

Clerk.

[Endorsed]: Filed June 28, 1949. [28]

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District Court of the United States for the  
Southern District of California, Central Division

No. 20745—Criminal

UNITED STATES OF AMERICA

vs.

ELVADOR G. GREENFIELD

### JUDGMENT AND COMMITMENT

On this 28th day of June, 1949, came the attorney for the government and the defendant appeared in



person and by counsel, Ben Margolis, Esq., and the Court having previously taken the matter under submission, did find the defendant guilty of contempt in refusing to answer each and any and every one of the questions set forth in the presentment; now, therefore,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of criminal contempt in violation of Section 401, Title 18, U. S. Code, for the defendant's refusal to answer each and any and every and all of the questions set forth in the Grand Jury presentment, said violation being as charged in the Grand Jury presentment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year in an institution of the type to be selected by the Attorney General.

It Is Adjudged that the bond of the defendant be, and it hereby is, exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and

that the copy serve as the commitment of the defendant.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed June 28, 1949. [29]

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District Court of the United States for the  
Southern District of California, Central Division

No. 20746—Criminal

UNITED STATES OF AMERICA

vs.

DOROTHY RAY HEALEY

JUDGMENT AND COMMITMENT

On this 28th day of June, 1949, came the attorney for the government and the defendant appeared in person and by counsel, Ben Margolis, Esq., and the Court having previously taken the matter under submission, did find the defendant guilty of contempt in refusing to answer each and any and every one of the questions set forth in the presentment; now, therefore,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of criminal contempt in violation of Section 401, Title 18, U. S. Code, for the defendant's refusal to answer each and any and

every and all of the questions set forth in the Grand Jury presentment, said violation being as charged in the Grand Jury presentment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months in an institution of the penitentiary type to be selected by the Attorney General.

It Is Adjudged that the bond of the defendant be, and it hereby is, exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed June 28, 1949. [30]

District Court of the United States for the  
Southern District of California, Central Division

No. 20747—Criminal

UNITED STATES OF AMERICA

vs.

HORACE MORTON NEWMAN, JR.

### JUDGMENT AND COMMITMENT

On this 28th day of June, 1949, came the attorney for the government and the defendant appeared in person and by counsel, Ben Margolis, Esq., and the Court having previously taken the matter under submission, did find the defendant guilty of contempt in refusing to answer each and any and every one of the questions set forth in the presentment; now, therefore,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of criminal contempt in violation of Section 401, Title 18, U. S. Code, for the defendant's refusal to answer each and any and every and all of the questions set forth in the Grand Jury presentment, said violation being as charged in the Grand Jury presentment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year in an institution of the type to be selected by the Attorney General.

It Is Adjudged that the bond of the defendant be, and it hereby is, exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed June 28, 1949. [31]



In the United States District Court for the  
Southern District of California, Central Division

No. 20743—Crim.

September, 1948, Term

Criminal Contempt, Section 401, Title 18,  
U. S. Code

### GRAND JURY PRESENTMENT

In the Matter of:

WITNESS MAX APPELMAN

### NOTICE OF APPEAL

Notice Is Hereby Given that Max Appelman, residing at San Francisco, California, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and sentence of the United States District Court for the Southern District of California, Central Division, adjudging him in contempt (criminal) of said Court, rendered and entered on June 28, 1949, and committing him to the custody of the Attorney General for a period of one year; said Max Appelman is presently confined, pursuant to said judgment and sentence, in the County Jail of the County of Los Angeles, State of California.

Dated: June 29, 1949.

MARGOLIS and McTERNAN,

By /s/ BEN MARGOLIS,

Attorneys for Appellant.

[Endorsed]: Filed June 29, 1949. [32]

In the United States District Court for the  
Southern District of California, Central Division

No. 20744—Crim.

September, 1948, Term

Criminal Contempt

Section 401, Title 18, U. S. Code

GRAND JURY PRESENTMENT

In the Matter of:

WITNESS ALVIN ABRAM AVERBUCK

NOTICE OF APPEAL

Notice Is Hereby Given that Alvin Abram Averbuck, residing at 2105 Cliff Road, Los Angeles, California, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and sentence of the United States District Court for the Southern District of California, Central Division, adjudging him in contempt (criminal) of said Court, rendered and entered on June 28, 1949, and imposing upon him a fine of Ten Dollars (\$10.00).

Dated: June 29, 1949.

MARGOLIS and McTERNAN,

By /s/ BEN MARGOLIS,

Attorneys for Appellant.

[Endorsed]: Filed June 29, 1949. [33]

In the United States District Court for the  
Southern District of California, Central Division  
No. 20745—Crim.

September, 1948, Term  
Criminal Contempt  
Section 401, Title 18, U. S. Code

## GRAND JURY PRESENTMENT

In the Matter of:  
WITNESS ELVADOR G. GREENFIELD

## NOTICE OF APPEAL

Notice Is Hereby Given that Elvador G. Greenfield, residing at 5866 South Broadway, Los Angeles, California, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and sentence of the United States District Court for the Southern District of California, Central Division, adjudging him in contempt (criminal) of said Court, rendered and entered on June 28, 1949, and committing him to the custody of the Attorney General for a period of one year; said Elvador G. Greenfield is presently confined, pursuant to said judgment and sentence, in the County Jail of the County of Los Angeles, State of California.

Dated: June 29, 1949.

MARGOLIS and McTERNAN,  
By /s/ BEN MARGOLIS,  
Attorneys for Appellant.

[Endorsed]: Filed June 29, 1949. [34]

In the United States District Court for the  
Southern District of California, Central Division

No. 20746—Crim.

September, 1948, Term

Criminal Contempt

Section 401, Title 18, U. S. Code

GRAND JURY PRESENTMENT

In the Matter of:

WITNESS DOROTHY RAY HEALEY

NOTICE OF APPEAL

Notice Is Hereby Given that Dorothy Ray Healey, residing at 1733 West 84th Street, Los Angeles, California, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and sentence of the United States District Court for the Southern District of California, Central Division, adjudging her in contempt (criminal) of said Court, rendered and entered on June 28, 1949, and committing her to the custody of the Attorney General for a period of eighteen months; said Dorothy Ray Healey is presently confined, pursuant to said judgment and sentence, in the County Jail of the County of Los Angeles, State of California.

Dated: June 29, 1949.

MARGOLIS and McTERNAN,

By /s/ BEN MARGOLIS,

Attorneys for Appellant.

[Endorsed]: Filed June 29, 1949. [35]

In the United States District Court for the  
Southern District of California, Central Division

No. 20747—Crim.

September, 1948, Term

Criminal Contempt

Section 401, Title 18, U. S. Code

## GRAND JURY PRESENTMENT

In the Matter of:

WITNESS HORACE MORTON NEWMAN, Jr.

## NOTICE OF APPEAL

Notice Is Hereby Given that Horace Morton Newman, Jr., residing at 4327 Tourmaline Avenue, Los Angeles, California, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and sentence of the United States District Court for the Southern District of California, Central Division, adjudging him in contempt (criminal) of said Court, rendered and entered on June 28, 1949, and committing him to the custody of the Attorney General for a period of one year; said Horace Morton Newman, Jr. is presently confined, pursuant to said judgment and sentence, in the County Jail of the County of Los Angeles, State of California.

Dated: June 29, 1949.

MARGOLIS and McTERNAN,

By /s/ BEN MARGOLIS,

Attorneys for Appellant.

[Endorsed]: Filed June 29, 1949. [36]



In the United States District Court for the  
Southern District of California, Central Division

No. 20746—Crim.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

DOROTHY RAY HEALEY,  
Defendant.

No. 20747—Crim.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

HORACE MORTON NEWMAN, JR.,  
Defendant.

No. 20745—Crim.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

ELVADOR G. GREENFIELD,  
Defendant.

No. 20743—Crim.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MAX APPELMAN,  
Defendant.

No. 20744—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALVIN ABRAM AVERBUCK,

Defendant.

## STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL

1. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that under the Fifth Amendment to the Constitution of the United States appellants had the right to refuse to answer said questions on the grounds that answers to said questions might tend to incriminate them.

2. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that said questions and said orders of the Court were directed to possible membership in or affiliation with, the Communist Party, a political organization, and said questions and the respective orders of the Court interfered with, obstructed, coerced and abridged their exercise of the rights and duties of political expression through speech, press, assembly,

association and petition, in contravention of the First Amendment to the Constitution of the United States.

3. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that said questions and said orders of the Court were directed to the compulsory disclosure [38] by appellants of their association or affiliation, or the absence thereof, with the Communist Party, a political organization, or officers or members thereof, and thereby violated the right of each appellant to privacy and silence in such matters, in contravention of the First, Fourth and Fifth Amendments to the Constitution of the United States.

4. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that said questions and said orders of the Court were directed to the compulsory disclosure by appellants of their association or affiliation, or the absence thereof, with the Communist Party, a political organization, or officers or members thereof, and thereby interfered with, obstructed, coerced and abridged their exercise of their governmental powers reserved to the people under the Ninth and Tenth Amendments to the Constitution of the United States.

5. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in sentencing appellants for contempt for their refusal to answer said questions in that said Grand Jury was not conducting a bona fide investigation but was carrying out a scheme, plan and design to harass and annoy appellants because they were believed to be members of the Communist Party, a political organization, and discriminately to apply the laws of the United States against appellants in such a manner as to impose punishment upon them solely and exclusively for the reason that they were believed to be members of said Communist Party.

6. The Court below erred in refusing to hear and to take evidence upon the appellants' challenge to the composition and selection of the Grand Jury.

7. The Court below erred and denied appellants due process of law in contravention of the Fifth Amendment to the Constitution of the [39] United States in refusing to receive evidence upon, and refusing offers to prove facts supporting each of the points specified above.

8. The Court below erred and denied appellants due process of law in contravention of the Fifth Amendment to the Constitution of the United States in quashing a subpoena directed to Tom C. Clark, Attorney General of the United States.

Dated: July 13, 1949.

MARGOLIS and McTERNAN,

By /s/ JOHN T. McTERNAN,

Attorneys for Appellants.

[Endorsed]: Filed June 14, 1949.

United States Court of Appeals,  
Ninth Circuit

[Title of Causes.]

APPLICATION FOR BAIL

Before: Denman,  
Chief Judge:

Appellants have been adjudged guilty of criminal contempt for refusal to answer certain questions propounded before the Grand Jury of the [42] United States District Court for the Southern District of California. The district court has denied them bail pending appeal. They move me as Chief Judge of this court for release on bail.

A hearing was had, the appellants and the United States being represented by counsel. Mr. A. L. Wirin appeared as *amicus curiae*.

Both parties agree that as such Chief Judge I have the power to release on bail under Rule 46(a) (2) of the Federal Rules of Criminal Procedure.

The motion is based upon appellants' contention that there is a justiciable question for the determination of this court of appeals as to whether the appellants, claiming the constitutional right to refuse to answer, are guilty of criminal contempt in their refusal to answer.

After a hearing lasting for some two hours, and a study of the questions by the Grand Jury and the proceedings before the district court, I hold that



there is a justiciable contention as to appellants' right to refuse to answer each question, which must be resolved by the court of appeals.

The prayer of the appellants is granted and the district court and custodian of appellants is ordered to release each of appellants upon his or her depositing with the United States District Court [43] for the Southern District of California bail in the amount of \$500.00 in cash or a bond for that amount in the form required by the rules of that court. The Clerk is ordered to issue a mandate hereon forthwith.

WILLIAM DENMAN,  
Chief Judge, United States Court of Appeals,  
Ninth Circuit.

[Endorsed]: Filed June 29, 1949.

PAUL P. O'BRIEN  
Clerk.

A True Copy,

Attest, June 29, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk. [44]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 52, inclusive, contain the original Presentment of the Grand Jury, Judgment and Commitment and Notice of Appeal in each of cases Nos. 20743 to 20747, inclusive, certified copy of Order of Judge Denman of the United States Court of Appeals for the Ninth Circuit, Designation of Contents of Record on Appeal, Counter-Designation of Contents of Record on Appeal and Statement of Points Upon Which Appellants Intend to Rely and full, true and correct copies of minute orders entered June 14, 23, 24, and 28, 1949 which, together with original respondents' exhibits A to F, inclusive, at the hearing on June 9, 1949, original government's exhibits 1 to 7, inclusive, at the hearing on June 10, 1949, original defendants' exhibits A and B at the hearing on June 23, 1949; copy of reporter's transcript of proceedings on June 14, 1949, in cause No. 8873-PH-Civil, of proceedings on June 9, 10, and 11, 1949 and May 26, 1949 in Re: Investigation by the Grand Jury Concerning Loyalty of Government Employees, entitled "Miscellaneous Investigation No. 279, 18 U. S. Code 1001, 18 U. S. Code 80 (Old Section) and of proceedings on June 14, 23, 24, 28 and 29, 1949 in the above entitled causes, transmitted herewith, and the

printed transcripts of record on appeals in causes Nos. 12081, 12217 and 12221 in the United States Court of Appeals for the Ninth Circuit constitute the transcript of record on the appeals in the above entitled causes to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$4.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 8th day of August, A.D. 1949.

EDMUND L. SMITH,

Clerk.

[Seal] By /s/ EDWARD T. DREW,  
Deputy.

In the District Court of the United States in and  
for the Southern District of California, Central  
Division

In Re:

INVESTIGATION BY THE GRAND JURY  
CONCERNING LOYALTY OF GOVERN-  
MENT EMPLOYEES, entitled "MISCEL-  
LANEOUS INVESTIGATION No. 279; 18  
U. S. CODE 1001, 18 U. S. CODE 80 (Old  
Section)."

Honorable Peirson M. Hall, Judge presiding.

REPORTER'S TRANSCRIPT  
OF PROCEEDINGS

Los Angeles, California  
May 26, 1949

Appearances

For the Government:

JAMES M. CARTER,

United States Attorney,

Los Angeles 12, California; and

MAX H. GOLDSCHHEIN,

Special Assistant to Attorney General,  
Washington, D. C.

For the Witnesses:

BEN MARGOLIS, Esq., and

JOHN T. McTERNAN, Esq.

MARGOLIS & McTERNAN,

112 West Ninth Street,

Los Angeles 15, California.

Mr. Margolis: Your Honor, I believe we ought to enter our appearance in these proceedings. Margolis & McTernan appearing for the three witnesses, by Ben Margolis and John McTernan.

The Court: Is Dorothy Healey here?

Mrs. Healey: I am.

The Court: And Mr. Greenfield?

Mr. Greenfield: Yes.

The Court: What is your first name?

Mr. Greenfield: Elvador.

The Court: E-l-v-a-d-o-r-e?

Mr. Greenfield: No "e"; E-l-v-a-d-o-r.

The Court: And Mr. Averbuck?

Mr. Averbuck: Here.

The Court: What is your first name?

Mr. Averbuck: My first name is Alvin, A-l-v-i-n.

The Court: Very well. Your counsel is Mr. Margolis and Mr. McTernan, for each one of you, is that correct? Mrs. Healey?

Mrs. Healey: Yes, sir.

The Court: Mr. Greenfield?

Mr. Greenfield: Correct.

The Court: Mr. Averbuck?

Mr. Averbuck: That is right.

The Court: Swear the witness. [3\*]

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\* Page numbering appearing at top of page of original Reporter's Transcript.



E. L. DRUMMOND

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: E. L. Drummond.

Direct Examination

By Mr. Goldschein:

Q. Mr. Drummond, what is your business?

A. Court reporter.

Q. How long have you been a court reporter?

A. A little over 30 years.

Q. Were you sworn to take the official transcript of the grand jury, the September grand jury 1948?

A. I was.

Q. Did you on this morning, the 26th day of May, 1949, take down in shorthand the testimony of Dorothy Healey, Elvador Claude Greenfield and Alvin Averbuck?

A. I did.

Q. Did you transcribe that testimony?

A. Not yet.

Q. You have your shorthand notes with you?

A. I have.

Q. Can you read those notes back to the court?

A. Yes, sir. [4]

Q. Will you, please, sir, read the questions propounded to Mrs. Dorothy Healey and the answers she gave?

A. Yes.

(Testimony of E. L. Drummond.)

## QUESTIONS RELATING TO MRS. HEALEY

“By Mr. Goldschein:

“Q. Your name is Dorothy Ray Healey, is it not? “A. It is.

“Q. You spell it H-e-a-l-e-y? “A. I do.

“Q. Where do you live?

“A. At 1733 West 84th Street.

“Q. That is in Los Angeles, California?

“A. Yes, sir.

“Q. Mrs. Healey, this grand jury is investigating certain federal employees who have made false statements to the federal government in reference to their connection with certain organizations.

“Now, you are not a federal employee, are you?

“A. I am not.

“Q. And, of course, you are not under investigation. As I told you our investigation is limited to that particular matter.

“What is your occupation? [5]

“A. I am an organizer.

“Q. Will you tell us who you are organizer for?

“A. I decline to answer that question on the grounds that it may incriminate me.

“Q. You mean incriminate you in connection with a federal employee?

“A. I think the answer stands. I decline to answer that question on the grounds that it may self-incriminate me.

“Q. Will you elaborate so we may understand

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

what you mean? You say you are not a federal employee. I have told you we are investigating federal employees. Will you elaborate on that some, please, madam?

“A. I don’t think the question needs elaboration. I think I am declining to answer on the grounds that the question that you asked me may possibly self-incriminate me.

“Q. Now, Mrs. Healey, do you know who has the books and records of the Los Angeles County Communist Party?

“A. I decline to answer that question on the same grounds.

“Q. Can you tell us, Mrs. Healey, whether or not the Los Angeles County Communist Party has a chairman?

“A. I decline to answer that question on the same grounds.

“Q. Can you tell us whether or not it has an organizational secretary?

“A. I decline to answer the question on the same grounds.

“Q. Can you tell us whether or not it has an education director?

“A. I decline to answer on the same grounds.

“Q. Can you tell us whether or not it has a labor director?

“A. I decline to answer on the same grounds.

“Q. Can you tell us whether or not the member-

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

ship or social director would have a list of the members of the Los Angeles County Communist Party?

"A. I decline to answer on the same grounds.

"Q. Can you tell us whether or not they have a financial director?

"A. I decline to answer on the same grounds.

"Q. Can you tell us whether or not the financial director would have a record of the dues paid by the members of the Los Angeles County Communist Party? [7]

"A. I decline to answer on the same grounds.

"Q. Now, Mrs. Healey, the question that I have just asked you are for the purpose of information. We are not interested particularly in how you know. All we are interested in is who they are.

"Can you tell us who they are?

"A. I decline to answer on the same grounds.

"Q. Can you tell us who has the record showing the dues paid by the membership of the Los Angeles County Communist Party?

"A. I decline to answer on the same grounds.

"Q. Now, Mrs. Healey, can you tell us the name of anyone who can give us that information I just asked you?

"A. I decline to answer on the same grounds.

"Q. But that information is available, is it not?

"A. I decline to answer on the same grounds.

"Q. Can you tell us how many divisions there are in the Los Angeles or the Los Angeles County Communist Party?

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

“A. I decline to answer on the same grounds.

“Q. Can you tell us how many sections there are in the divisions?

“A. I decline to answer on the same grounds. [8]

“Q. Can you tell us how many clubs there are?

“A. I decline to answer on the same grounds.

“Q. Can you tell us how many squads there are?

“A. I decline to answer on the same grounds.

“Q. Mrs. Healey, can you tell us who is chairman of the eastern division of the Los Angeles County Communist Party?

“A. I decline to answer on the same grounds.

“Q. Can you tell us who is the chairman of the midtown division of the Los Angeles County Communist Party?

“A. I decline to answer on the same grounds.

“Q. Can you tell us who is the head of the southern division of the Los Angeles County Communist Party?

“A. I decline to answer on the same grounds.

“Q. Can you tell us who is the head of the western division of the Los Angeles County Communist Party?

“A. I decline to answer on the same grounds.

“Q. Can you tell us who is the head of the youth division of the Los Angeles County Communist Party?

“A. I decline to answer on the same grounds.



(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

“Q. Can you tell us who is the head of the [9] student section of that youth division?

“A. I decline to answer on the same grounds.

“Q. Mrs. Healey, each division has a chairman, does it not?

“A. I decline to answer on the same grounds.

“Q. Or sometimes called an organizer?

“A. I decline to answer on the same grounds.

“Q. Does each division have an organizational secretary?

“A. I decline to answer on the same grounds.

“Q. Does each have a membership or social secretary?

“A. I decline to answer on the same grounds.

“Q. Does each have a membership or social director?

“A. I decline to answer on the same grounds.

“Q. Does the membership or social director of each division have a list of the membership of that division?

“A. I decline to answer on the same grounds.

“Q. Does each division have a financial director?

“A. I decline to answer on the same grounds.

“Q. Do not the membership director and the financial director have the books and records of the Los Angeles County Communist Party?

“A. I decline to answer on the same grounds.

“Q. Will you tell us who has the books and records of the Los Angeles County Communist Party?

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

“A. I decline to answer on the same grounds.

“Q. Mrs. Healey, the *Daily People's World*, are you familiar with that? Have you seen it?

“A. Yes, I have seen the paper.

“Q. Of April 28, 1949, did you see that issue?

“In an article headed ‘Mrs. Healey No. 18 in Los Angeles Witch Hunt,’ it states ‘Mrs. Dorothy Ray Healey, organizational secretary of the Los Angeles Communist Party, today announced that on her return to work after six months’ leave of absence she was subpoenaed to appear before the federal grand jury.’

“And ‘The *Daily People's World* of May 25, 1949, carries on its front page an article regarding a proposed picket line on the Los Angeles Federal Building in protest of the grand jury’s proceeding.’

“Now, that statement with reference to Mrs. Dorothy Ray Healey, the organizational secretary of the Los Angeles Communist Party, is that designation correct with reference to you? [11]

“A. I decline to answer on the same grounds.

“Q. Do you know anything about the *Daily People's World*?

“A. You would have to be more specific.

“Q. I mean, is it a reliable paper?

“A. I think their reliability is a public record.

“Q. Is a public record?

“A. It is a public record, regarding its reliability.

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

“Q. Well, now, I am not familiar with it. This is, I think, the first or second copy I have ever seen of it. I am not from Los Angeles, and that is the reason I asked you. You say you know the paper and are familiar with it.

“Is it a reliable publication?

“A. I would like to consult with my counsel before answering that question.

“Q. It is an opinion. If you don't care to give it, that is all right.

“A. I would like to consult with my attorney before answering the question.

“Q. You mean its reliability is questionable?

“A. I would like to consult with my attorney before answering the question. [12]

“Q. All right. Mrs. Healey, when did you first learn that a subpoena had been issued for you?

“A. I decline to answer on the same grounds.

“Q. You knew, did you not, that on October 25 a subpoena had been issued for you?

“Mr. Carter: 1948.

“Q. (By Mr. Goldschein): 1948.

“A. I would like to consult with my attorney before answering the question.

“Q. This article that I read to you said that you returned after a six months' leave of absence. Will you tell this grand jury where you were prior to your return?

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

“A. I would like to consult with my attorney before answering the question.

“Mr. Goldschein: All right, Mrs. Healey. We will recess you for a few minutes.

“The Witness: Thank you.

“(Witness leaves room and later returns.)

“Q. (By Mr. Goldschein): Mrs. Healey, I believe the last question was where were you prior to your returning to Los Angeles to business.

“A. I decline to answer on the ground it may be self-incriminating.

“Q. Now, you gave us your home address, I believe, [13] did you not? “A. Yes.

“Q. What is your business address?

“A. I decline to answer on the same grounds.

“Q. Now, will you tell us where you were served with process, where you were served with a subpoena?

“A. I had left my home about five minutes before that, I am trying to remember—I live on 84th.

“Q. Was it at your place of business?

“A. I had left my home and it was about five minutes later. It was somewhere on Normandy right near my home.

“Q. It was not at your place of business?

“A. No.

“Q. Mrs. Healey, are you married?

“A. Yes.

“Q. What is your husband's name?

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

"A. Mr. Goldschein, you know and I know that that question has no relevancy to this question of any inquiry into any federal employees and you know and I know why you want to ask the question.

"I am sure Mr. Carter's friends and Mr. Carter are particularly interested whenever someone's family or acquaintances are drawn into here or in open [14] court or through some very strange unofficial leaks into the papers.

"Q. Mrs. Healey, don't you know whether or not your husband is a federal employee, if you have a husband?

"A. He is not a federal employee and has never been a federal employee.

"Q. Now, will you tell us his name?

"A. His name is Philip Connelly.

"Q. Is Mrs. Dorothy Healey your maiden name?

"A. It is my name. I just have never assumed my husband's name, inasmuch as I am known as Mrs. Healey, I have maintained that name.

"Q. I take it that Dorothy Ray Healey is—or Mr. Healey is the man you were married to prior to Mr. Connelly?

"A. You are correct.

"Q. And you are divorced from Mr. Healey?

"A. That is correct.

"Q. And, now, Mrs. Healey, the grand jury wants you and directs you to bring with you here this afternoon, when you return to the grand jury at 2:00 o'clock, all books, records, memoranda and



(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

files that you may have of the Los Angeles Communist Party or the Los Angeles County Communist Party, [15] particularly those showing membership in the Communist Party or dues paid by members to the Communist Party of Los Angeles or the Los Angeles County Communist Party.

“The Foreman: Mrs. Healey, you are ordered herewith and directed to produce those records this afternoon at 2:00 o’clock.

“The Witness: Am I excused now?

“Mr. Goldschein: You will return here then, please?

“The Witness: Yes, of course.

“The witness then left the room and asked to return and said:

“The Witness: I think it should be explained in answer to your last request that I do not have any such records, that I never have had any such records.

“Mr. Carter: Well, then, we will modify the direction that you bring in the records of the Communist Party of Los Angeles County, whether they are in your possession or not.

“Q. (By Mr. Goldschein): You are in charge of those records, are you not? “A. No.

“Q. Who is?

“A. I decline to answer that on the ground, [16] same grounds as before.

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

“Q. (By Mr. Goldschein): You have no control over the records at all? [17]      “A. None.

“Q. Have you ever had any control over them?

“A. No.

“Q. (By Mr. Carter): Do you know who does have control over the records?

“A. That I decline to answer on the grounds it may be self-incriminating.

“Mr. Goldschein: Mrs. Healey, the grand jury directs you, an organizer of the Communist Party, to bring with you this afternoon at 2:00 o'clock all books and records and memoranda of the Communist Party of Los Angeles County or the Los Angeles County Communist Party, whatever the name may be. You will return here at 2:00 o'clock, please, madam. [18]

\* \* \*

“(When the witness returned to the room she said:)

“The Witness: I think it should be explained in answer to your last request that I do not have any such records, that I never have had any such records.

“Mr. Carter: Well, then, we will modify the direction that you bring in the records of the Communist Party of Los Angeles County, whether they are in your possession or not.

“Q. (By Mr. Goldschein): You are in charge of those records, are you not?      “A. No.

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

“Q. Who is?

“A. I decline to answer that on the ground, same grounds as before.

“Q. (By Mr. Carter): Were you ever in charge of those records?

“A. No, I never was.

“Q. (By Mr. Goldschein): Did you ever have the records in your possession? “A. Never.

“Q. (By Mr. Carter): Are there records in the place of business where you work?

“A. I decline to answer that on the ground it may be self-incriminating.

“Q. (By Mr. Goldschein): Mrs. Healey, those records are made by somebody who works under your direction, is that not so?

“A. I would like to consult with my attorney before answering that.

“Mr. Goldschein: All right.

“(Witness leaves room and returns.)

“The Witness: Would you rephrase the question?

“Mr. Goldschein: Will you read the question, Mr. Reporter?

“(The question was read.)

“The Witness: The answer is no.

“Q. (By Mr. Goldschein): You have no control over the records at all? “A. None.

“Q. Have you ever had any control over them?

“A. No.

(Testimony of E. L. Drummond.)

(Questions Relating to Mrs. Healey.)

“Q. (By Mr. Carter): Do you know who does have control over the records?

“A. That I decline to answer on the ground it may be self-incriminating.

“Mr. Goldschein: Mrs. Healey, the grand jury directs you, an organizer of the Communist Party, to bring with you this afternoon at 2:00 o'clock all books and records and memoranda of the Communist Party of Los Angeles County or the Los Angeles County Communist Party, whatever the name may be. You will return here at 2:00 o'clock, please, madam.” [21]

\* \* \*

### Direct Examination

By Mr. Goldschein:

Q. Mr. Drummond, were you present when the witness Elvador Claude Greenfield was present in the grand jury room and sworn? A. I was.

Q. Did you take down in shorthand the questions asked him and the answers he gave?

A. I did.

Q. Will you read those questions and answers to the court, please. A. Yes, sir.

The Court: First of all, tell me when it was.

Q. (By Mr. Goldschein): Was that following Dorothy Healey's appearance before the grand jury today, the 26th day of May, 1949?

A. It was immediately following her appearance and immediately after she was excused until 2:00 o'clock.

(Testimony of E. L. Drummond.)

The Court: Which was today?

The Witness: This morning; yes.

QUESTIONS RELATING TO  
MR. GREENFIELD

By Mr. Goldschein:

“Q. What is your full name, sir?

“A. Elvador G. Greenfield.

“Q. Where do you live?

“A. 5866 South Broadway.

“Q. What is your business?

“A. I am at present unemployed.

“Q. Were you ever employed by the federal government? “A. No.

“Q. Mr. Greenfield, this grand jury is investigating [38] federal employees who have made false statements to the federal government with reference to their connection with certain organizations. The grand jury is not investigating you especially, since you are not a government employee. All we want from you is what you know about matters under question.

“Now, do you know who has the books and records of the Los Angeles County Communist Party?

“A. I refuse to answer on the ground it may incriminate me.

“Q. Do you know Mrs. Dorothy Healey?

“A. As she is connected with this case only.

“Q. What do you mean by ‘as she is connected with this case’?



(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Greenfield.)

“A. Well, I know that she is connected with this case.

“Q. What case?

“A. What we are here for.

“Q. You mean you know she was subpoenaed as a witness before the grand jury.

“A. What I know, she is out here in the anteroom.

“Q. Sir?

“A. I know she is out in the anteroom. [39]

“Q. Was that the first time you ever saw her?

“A. I refuse to answer that on the ground it may incriminate me.

“Q. How long have you known her?

“A. I refuse to answer that on the ground it may incriminate me.

“Q. Does she have the books and records of the Los Angeles County Communist Party, do you know?

“A. I refuse to answer that on the ground it may incriminate me.

“Q. Do you know who has the books and records of the Los Angeles County Communist Party?

“A. I refuse to answer that on the ground it may incriminate me.

“Q. Mr. Greenfield, do you know whether or not the Los Angeles County Communist Party is divided up into divisions?

“A. I refuse to answer that on the ground of incrimination.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Greenfield.)

“Q. Can you tell us how many divisions there are?

“A. I refuse to answer that on the same grounds.

“Q. Will you tell us whether or not each division of the Communist Party of Los Angeles County keeps books of the membership of that division?

“A. I refuse to answer that on the ground of incrimination.

“Q. Can you tell us whether or not you know the names of the chairmen or the directors of these divisions or the organizers of these divisions?

“A. Repeat the question, please.

“Q. Will you tell us the names of the chairmen or organizers of these divisions?

“A. I refuse to answer on the ground of incrimination.

“Q. Will you tell us whether or not these divisions each have a membership or social director?

“A. I refuse to answer on the ground of incrimination.

“Q. Mr. Greenfield, we want to know the names of these people that hold these offices. That is the purpose of asking you this question.

“Can you tell us whether or not there is a financial organizer in each division, and who they are?

“A. I really don't understand the question.

“Q. Well, does each division have a financial director? If so, will you give us their names?

“A. I would refuse to answer that on the ground of incrimination.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Greenfield.)

“Q. Mr. Greenfield, when did you first learn [41] that there was a subpoena issued by this grand jury for your attendance here?

“A. I refuse to answer that on the ground of incrimination.

“Q. When were you subpoenaed to appear here?

“A. When was a subpoena ever given to me to attend here, is that what you mean?

“Q. Yes.

“A. There never was any subpoena given to me.

“Q. Sir?

“A. There never was a subpoena given to me.

“Q. When were you notified that you were wanted before this grand jury, May 6, 1949?

“A. Yes.

“Q. Well, you were arrested on a bench warrant on that day.

“A. That is right.

“Q. Where were you prior to the time that you were arrested?

“A. I refuse to answer that on the ground of incrimination.

“Q. (By Mr. Carter): Where were you between October 25, 1948 and May 6, 1949?

“A. I refuse to answer that on the ground of self-incrimination. [42]

“Q. (By Mr. Goldschein): You knew in October that there was a subpoena out for you, did you not?

“A. I refuse to answer that on the ground of incrimination.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Greenfield.)

“Mr. Goldschein: You may wait outside, sir.

“(He was then recalled at 1:30 p.m.)

“Q. (By Mr. Goldschein): Mr. Elvador Claude Greenfield recalled. That is your full name, isn't it?

“A. That is right.

“Q. Mr. Greenfield, I believe I asked you this morning whether or not you knew who had the books and records of the Los Angeles County Communist Party. Did I ask you that question?

“A. I think you did.

“Q. What was your answer?

“A. That I refused to answer on the ground of incrimination.

“Mr. Goldschein: All right, sir. Will you wait outside, please, sir?

“The Witness: Yes.”

Q. (By Mr. Goldschein): I believe I asked you whether or not the witness was sworn before he was asked these questions?

A. He was sworn by the foreman; yes, sir. [43]

The Court: Cross-examine.

Mr. Margolis: Not at this time, your Honor.

The Court: Very well.

By Mr. Goldschein:

Q. Mr. Drummond, were you in the grand jury room on May 26, 1949, when Alvin Abram Averbuck appeared before the grand jury?

Q. Did you take down in shorthand all the questions that were asked him there and all the answers that he gave?           A. I did.

(Testimony of E. L. Drummond.)

Q. Was Mr. Averbuch sworn?

A. He was sworn by the foreman.

Q. Will you please read those questions asked him and the answers he gave?      A. Yes.

#### QUESTIONS RELATING TO MR. AVERBUCK

“By Mr. Goldschein:

“Q. Your name is Alvin Abram Averbuck, is it not?      “A. That is correct.

“Q. Where do you live, Mr. Averbuck?

“A. I live at 2105 Clifford Street, in the city of Los Angeles, Zone 26.

“Q. What is your business, Mr. Averbuck?

“A. Well, I am an organizer.

“Q. What is your business address? [44]

“A. Well, I have been working from my house and I also work from a downtown office at 124 West 68th Street.

“Q. Is that an office building?

“A. That is correct.

“Q. What room or what office number is it?

“A. I do not know the exact number just off-hand.

“Q. What name is on the door?

“A. That question I refuse to answer on the grounds that it possibly may incriminate me.

“Q. What floor of that building is it on?

“A. The fifth floor.

“Q. The fifth floor. Now, can you designate it in any other way? Is your name on the door?

“A. It is not.



(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Averbuck.)

“Q. Is any individual’s name on the door?

“A. I do not know.

“Q. How many offices are there on that floor?

“A. I do not know that.

“Q. Approximately.

“A. I couldn’t even hazard a guess. I have never walked around the floor.

“Q. Now, can you describe getting to your office on that floor from the elevator? [45]

“A. I refuse to answer that question on the ground that it possibly might incriminate me.

“Q. Well, you told us on the fifth floor of that building. How would your telling us where your office, the specific office would incriminate you, sir?

“A. I think there are certain connections there that possibly could incriminate me.

“Q. Do you know Mrs. Dorothy Healey?

“A. I refuse to answer that question on the ground that it would or possibly could incriminate me.

“Q. Mr. Averbuck, this grand jury is investigating federal employees, that is, whether some federal employees in this district have made false statements with reference to their connection or affiliation with certain organizations.

“Now, you are not a federal employee, are you?

“A. I am not.

“Q. And have not been for the past five years, have you? “A. That is correct.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Averbuck.)

“Q. So this investigation can’t possibly touch you, can it?

“A. It certainly can, I think, and that is why [46] I am refusing to answer on the ground that it can possibly incriminate me.

“Q. Can incriminate you even though it is not directed toward you, you still refuse?

“A. Well, I understand that it is not directed towards me.

“Q. Sir?

“A. That is your statement, I understand, that it is not directed towards me.

“Q. That is right. Now, with that explanation, will you answer my question with reference to how to locate this office on the fifth floor at the address you just gave us?

“A. I give the same answer, that I refuse to answer on the ground that it may possibly incriminate me.

“Q. Mr. Averbuck, do you know who has the books and records of the Los Angeles County Communist Party?

“A. I refuse to answer the question on the same ground, that it may possibly incriminate me.

“Q. Now, do you know how many divisions of the Los Angeles County Communist Party there are?

“A. I refuse to answer that question on the same grounds, that it may possibly incriminate me.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Averbuck.)

“Q. Do you know the names of any of the chairmen [47] of any of the divisions of the Los Angeles County Communist Party?

“A. I refuse to answer that question on the same grounds, that it may possibly incriminate me.

“Q. Do you know the names of the membership or social organizers of any of the divisions of the Los Angeles County Communist Party?

“A. I refuse to answer that question on the same grounds, that it may possibly incriminate me.

“Q. Do you know the names of the financial organizers or financial directors of any of the divisions of the Los Angeles County Communist Party?

“A. For the same ground I refuse to answer, because it may possibly incriminate me.

“Q. Do you know the names of the officials of any of the divisions of the Los Angeles County Communist Party that have the books and records of that division of the Communist Party?

“A. I refuse to answer on the ground that it may incriminate me.

“Q. Do you know or have you ever met a former government employee named Morell?

“A. I would like to consult my attorney about that.

“Q. Did you ever see Mrs. Dorothy Healey with any [48] of the books or records of the Los Angeles County Communist Party?

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Averbuck.)

“A. I refuse to answer that on the ground that it would and possibly could incriminate me.

“Q. What did you say your occupation was?

“A. Organizer.

“Q. For whom?

“A. For the same reason I refuse to answer that, on the grounds that it possibly may incriminate me.

“Q. When did you first learn that you were being sought as a witness to appear before this grand jury?

“A. The day that I was served was when I first knew that I was being sought to appear as a witness by this grand jury.

“Q. When was that, sir?

“A. May 6 of this year, 1949.

“Q. You didn't know prior to that time that you were being sought as a witness?

“A. I did not know.

“Q. Did you discuss with anybody your being sought as a witness before this grand jury, prior to May 6th?

“A. I refuse to answer that question on the [49] ground that it would and possibly could incriminate me.

“Q. Where were you from October of 1948 up until May 6th?

“A. I refuse to answer that question on the ground that it possibly could incriminate me.

“Mr. Goldschein: That is all. Will you wait outside, please, sir?”

(Testimony of E. L. Drummond.)

The Court: Cross-examine.

Mr. Margolis: Not at this time, your Honor.

I assume the government has concluded?

Mr. Goldschein: That is right.

Mr. Carter: Pardon us just a moment, your Honor.

(Conference between government counsel.)

\* \* \*

The Court: Well, that is all right with me.

In so far as the matters of Healey, Greenfield and Averbuck are concerned, they are continued to Friday, June 3, at 10:00 o'clock in the morning in this courtroom. Mrs. Healey, Mr. Greenfield and Mr. Averbuck are now ordered and directed to be and appear at that time. [58]

I understand they all have bonds on some other proceedings? One of them does. Who does?

Mr. Margolis: Mr. Greenfield I know is on bond. I think the other two are not.

The Court: They are ordered and directed to be here at that date and hour. The grand jury will return to the grand jury room.

(Recess.) [59]

\* \* \*

The Clerk: The roll of the grand jury has been called, your Honor, and a quorum is present.

The Court: Very well. Mr. Carter?

Mr. Carter: If the court please, the grand jury desires to present to the court the matter of the



witness Horace Morton Newman, Jr., who was asked certain questions and refused to answer them upon the ground he might incriminate himself. It is the position of the grand jury and the government that the questions did not incriminate and we desire at this time to make a presentment on the testimony of the witness.

The Court: Very well. Swear the witness.

Mr. Carter: The grand jury is present. The record so shows?

The Court: Yes.

### E. L. DRUMMOND

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: E. L. Drummond.

The Clerk: Your address?

The Witness: 106 West Third Street. [60]

### Direct Examination

By Mr. Carter:

Q. Mr. Drummond, you are an official court reporter?      A. Yes, sir.

The Court: Just a moment. In the proceedings of the three witnesses previously heard this afternoon, the witness was sworn only once, which brings up the question as to the type of proceedings. I do not think it necessary to swear him with relation

(Testimony of E. L. Drummond.)

to the testimony as to each witness because the title of these proceedings, Mr. Clerk and Mr. Reporter, will be in the matter of: Investigation into the Loyalty of Government Employees, Alleged Violations of Old Title 18, U. S. Code, Section 80, Revised Title 18, U. S. Code, Section 1001.

Very well.

Q. (By Mr. Carter): Mr. Drummond, on April 21, 1949, did you report some testimony of this grand jury here in court? A. I did, sir.

Q. And was Horace Morton Newman, Jr., a witness called before that grand jury?

A. He was.

The Court: April 21st?

Mr. Carter: April 21st.

Q. Was the witness sworn who testified before the [61] grand jury? A. He was.

The Court: Were you previously sworn as a reporter?

The Witness: Yes, sir.

Q. (By Mr. Carter): Will you read from the transcript that you have prepared of the proceedings on April 21, before the grand jury, all the testimony of Mr. Newman, the questions asked and the answers given.

I have already spoken to counsel, your Honor, and he has no objection to this procedure, rather than using the shorthand notes.

The Court: That is to say, he has no objection to the reporter reading from the transcript?

(Testimony of E. L. Drummond.)

Mr. Carter: That is right.

The Court: Very well.

Mr. Margolis: In lieu of reading from the shorthand notes.

The Court: In lieu of reading from the shorthand notes?

Mr. Margolis: Yes.

## QUESTIONS RELATING TO MR. NEWMAN

The Witness: "Horace Morton Newman, Jr., called as a witness before the grand jury, having been first duly sworn by the Foreman, was examined and testified as follows: [62]

### "Examination

"By Mr. Carter:

"Q. Your name is Horace Morton Newman, Jr.?

"A. Yes, sir.

"Q. Where do you live?

"A. 4327 Tourmaline Avenue, Los Angeles.

"Q. How long have you lived there?

"A. Approximately 2 years.

"Q. Where did you live before that?

"A. 9120 South Wilton Place, Los Angeles.

"Q. And how long have you lived in this county?

"A. Well, since I was discharged from the Army in September of 1945, and I previously lived here since about 1922 or '23, a good many years, most of my life.

"Q. And did you serve in the Army during this last war?

"A. Yes, I did.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

“Q. What branch of the service?

“A. I was in the Army, I was in the medics, medical corps, and in the infantry.

“Q. Did you have a rating or commission?

“A. Well, as a matter of fact I had just a rating as a non-commissioned officer, technician 5th grade, and later a technical sergeant. [63]

“Q. Did you volunteer or were you drafted?

“A. I volunteered.

“Q. When did you volunteer?

“A. I volunteered in April of '43. I was at that time a 3-A, as I had two small children.

“Q. And you served until what date?

“A. Until September of 1945.

“Q. Where did you see service?

“A. Overseas most of the time, in the South Pacific, New Caledonia, I was there for some time and then in Manila, Luzon, and Philippine Islands.

“Q. You volunteered because you were a citizen of this country? “A. That is right.

“Q. And wanted to protect this country?

“A. That is correct.

“Q. If war should break out tomorrow with the Soviet Union, would you again volunteer to fight for your country?

“A. Could I speak to my attorney before I answer that question?

“No, it is not necessary. If you want to speak to him, we don't want to take away your right to talk to your attorney, go ahead and talk to him.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

“(Witness leaves room and returns.) [64]

“The Witness: It is my attorney’s advice that this question does not come under the realm of investigation of this grand jury and that it actually invades my rights of opinion and so forth, and so that is my own opinion. You know, this is an ‘iffy’ sort of question which is highly speculative, an event that I do not believe is likely to happen, as a matter of fact.

“Q. I only asked you the question because you injected into your answers the fact of your service in the Army and I wanted to bring that out. You raised the question of your having fought for this country in the last World War, and that is the reason for the question I asked you, just to sort of complete the record, Mr. Newman.

“A. I see.

“Q. You decline to answer it, do you?

“A. Well, beyond that answer, yes.

“Q. Mr. Newman, I want to inform you as to the purpose of this investigation which is being conducted by this grand jury. We are not investigating the Communist Party. We are not investigating their official setup. We are not investigating their purposes, we are not investigating their activities materially. There has been no witness called before [65] this grand jury who has been asked any questions on any of those subjects. What we are investigating are some cases referred



(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

to the U. S. Attorney's office for investigation and prosecution, involving generally the loyalty of government employees. Whenever a case is referred to this office the man who is named in that case is referred to as the subject, these subjects that are under investigation are employees of the federal government who are alleged to have made a false statement to the employing agency.

"The federal law provides that if a person makes a false statement to the agency which employs him or to any federal agency, he has committed a crime. These subjects as part of the government's loyalty program were asked whether or not they were or had been members of the Communist Party and they stated they were not and had not been members of the Communist Party. It therefore becomes material to find out whether they told the truth or lied about the matter. It is a matter of considerable importance to them, because their jobs, and the reputations and whether or not they would be prosecuted for a crime hinges upon the ascertainment of that fact.

"That is what we are trying to find out. We have had information indicating Dorothy Healey either has the membership records or knows where the membership records are of the Communist Party of Los Angeles County.

"We have had a subpoena issued for her. We have been unable to serve her and we therefore called you in to get some information. You are not

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

under investigation. We are not investigating you. We are not investigating your activities. If we ever start to investigate them, let me assure you it will be a good bit different investigation than the one which is being conducted. We do not intend to use what you tell us in any proceeding against you. The law is that you have no right to protect another person. And there is the privilege against self-incrimination which the court must rule on if you claim it, but that does not concern any protection to any other person. Do you understand what I have told you?

"A. Yes, I do.

"Q. Do you know Dorothy Healey?

"A. I am going to have to claim the privilege in response to that question.

"Q. Do you know where she lives? [67]

"A. I will have to claim the same privilege.

"Q. Do you know her office address?

"A. I want to claim the same privilege.

"Q. Do you know her business or occupation?

"A. I have to claim the same privilege.

"Q. Do you know her husband's name?

"A. The same privilege.

"Q. Do you know her husband's occupation?

"A. I am going to have to claim the same privilege.

"Q. Do you know where Dorothy Healey could be found or located?

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

“A. I will have to claim the same privilege.

“Q. Have you seen Dorothy Healey recently?

“A. I will have to claim the same privilege.

“Mr. Carter: Any other questions?

“Q. (By Mr. Carter): You are under bond, are you not? “A. That is correct.

“Q. For appearance in court?

“A. That is right.

“Q. If this grand jury calls you back at some later date and notifies you to appear again before the grand jury, will you appear?

“A. Yes, sir, I will. [68]

“Mr. Carter: With that assurance we will excuse you at this time.

“(Witness excused.)”

By Mr. Carter:

Q. Now, Mr. Drummond, did you today take certain testimony of the witness Horace Morton Newman, Jr., before the grand jury?

A. I did.

Q. Today, May 26th? A. Yes, sir.

Q. Were you sworn as the reporter today?

A. I was sworn at the time the grand jury was impaneled.

Q. Was Mr. Newman again sworn as a witness before the grand jury? A. He was.

Q. Do you have your notes with you of the testimony you took down, the questions and answers? A. I do.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

Q. Will you read from your shorthand notes the proceedings that occurred today?      A. Yes, sir.

“By Mr. Goldschein:

“Q. Your name is Horace Morton Newman, Jr., is it not? [69]      “A. That is right.

“Q. Where do you live?

“A. 4327 Tourmaline Avenue, Los Angeles.

“Q. You were before this grand jury on April 21, 1949, were you not?

“A. To the best of my recollection it was some date in the latter part of April. I believe that is correct.

“Q. You were here just one time?

“A. I think that is correct, yes.

“Q. Now, Mr. Newman, what is your occupation?      “A. An educational director.

“Q. You are not employed by the federal government now, are you?      “A. No.

“Q. Nor have you been for the past three or four years?      “A. That is—well, let’s see——

“Q. The last three years, anyway?

“A. That is correct.

“Q. Now, this grand jury is investigating a false statement or false statements made by federal employees who are now employed by the government, with reference to certain of their connections and associations, so that would not involve you at all, [70] since you are not a federal employee nor have you been for the past three years.

“That is so, is it not? You are not a federal

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

employee, are you? "A. No, I am not.

"Q. Nor have you been for the past three years?

"A. That is correct.

"Q. And we are now investigating the question of federal employees, as I just stated to you, so that question does not involve you, does it?

"A. Well, I am not sure of the legal technicalities involved.

"Q. All right, but it does not involve you, and you are not now, by this grand jury, you are not under investigation. That is not a question I am asking you, it is a statement I am making to you. This grand jury is not investigating you, just to put your mind at ease.

"Now, what is your business address?

"A. I am going to have to claim the privilege of refusing to answer that on the grounds that it might incriminate me.

"Q. Who are you educational director for?

"A. I am going to have to make the same answer to that question. [71]

"Q. You are fearful that that question may incriminate you, the answer to it?

"A. That is right.

"Q. Do you know who the financial director is of the eastern division of the Los Angeles County Communist Party?

"A. I will have to make the same answer to that.

"Q. Do you know who the membership or social



(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

director is of the eastern division of the Los Angeles County Communist Party?

"A. I will have to make the same answer to that.

"Q. Now, who is the chairman of the Los Angeles County Communist Party?

"A. I wish to make the same answer to that.

"Q. Who is the organizational secretary of the Los Angeles County Communist Party?

"A. I wish to make the same answer to that.

"Q. Do you read the People's World?

"A. Before answering that, may I speak to my counselor?

"Q. Yes, but rather than waste time we will withdraw the question. Do you know whether or not the Los Angeles County Communist Party has an [72] educational director?

"A. I will have to make the same answer to that.

"Q. What did you say previously when I asked you your occupation? Did you say you were an educational, what——

"A. I was an educational director.

"Q. Now, do you know whether or not the Los Angeles County Communist Party has a labor director? "A. I wish to make the same answer.

"Q. Do you know whether or not they have a membership or social director?

"A. I wish to make the same answer.

"Q. Do you know whether or not the membership or social director has a list of the membership of the Los Angeles County Communist Party?

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

“A. I wish to make the same answer.

“Q. Do you know whether or not the Los Angeles County Communist Party has a financial director?  
“A. I wish to make the same answer.

“Q. Do you know whether or not the financial director keeps an account of the dues collected from the members of the Los Angeles County Communist Party?  
“A. I wish to make the same answer.

“Q. (By Mr. Carter): Do you keep any records of any kind in connection with carrying on your duties as an educational director?

“A. May I ask a question for clarification?

“Q. Yes, sir.

“A. What would you mean by the term ‘records’?

“Q. Memoranda, notes, lists of names, any sort of records that you keep in connection with carrying on your business as an educational director.

“A. May I speak to my counsel before answering that question?

“Mr. Carter: All right.

“Mr. Goldschein: Ask him about this question I asked you, too.

“The Witness: These two questions.

“Mr. Goldschein: Hurry back, please, sir.

“(Witness leaves room and returns.)

“The Witness: In reference to the first question, in that order, am I right, I believe you said that you were not investigating me. If you are, I will have

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

to refuse to answer on the ground that this question may incriminate me.

“In answer to the second, on the question of records, I do not keep any records.

“Q. (By Mr. Carter): Do you have any records of [74] any kind under your control kept by another person? “A. No.

“Q. (By Mr. Goldschein): Do you keep any memoranda of the meetings that you hold in connection with your work and people that you see?

“A. No.

“Q. Do you keep any memoranda as to dates when you hold meetings?

“A. Well, it is not memoranda, no.

“Q. Notes, anything at all, a record, do you keep a record of it? “A. No.

“Q. What do you call it? You say you don't call it memoranda. What do you call it, a note book? “A. No, no.

“Q. What do you call it?

“A. Well, I like to know where I am going on a day, you know, what my——

“Q. Itineraries? “A. That sort of thing.

“Q. That is a memorandum, isn't it?

“A. Well, but it would only mean anything to myself.

“Q. Do you keep them? “A. No, I don't.

“Q. What do you do with it?

“A. Destroy it.

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

“Q. Do you keep any record of how many people you see?      “A. No.

“Q. Whom you meet with?      “A. No.

“Q. The people who attend your conferences?

“A. No.

“Q. Who keeps those records? How do you know who to see?      “A. I make appointments.

“Q. Do you keep a record of those appointments?      “A. No, I do not.

“Q. Do you report to anybody who you see?

“A. I am going to have to refuse to answer that on the ground, on the same grounds of possible self-incrimination.

“Q. You mean who you report to?

“A. Yes, if I were to answer that it might incriminate me.

“Q. Now, what did you say about if the investigation is directed toward you?

“A. Yes, I mean in answer to your first question relative to what I read, it would appear to be an investigation [76] of me, of my reading.

“Q. No, we are not investigating you.

“A. I see.

“Q. The question is, do you read the People's World?

“A. This would appear to be an investigation of my reading.

“Q. No, it is not. I want to know with reference to whether or not you have any opinion as to

(Testimony of E. L. Drummond.)

(Questions Relating to Mr. Newman.)

the veracity or the authenticity of the articles they write.

“A. On that kind of a question I will have to refuse to answer.

“Q. You mean you refuse to answer whether or not the People’s World can be believed?

“A. That was not the question I was answering. I was answering——

“Q. Now, that is the question. Is it reliable, do you know?

“A. May I speak to my counsel before answering that?

“Q. Well, do you have an opinion on it?

“A. I would like to speak to my counsel before answering.

“Mr. Goldschein: Well, strike the question. [77]

“Q. (By Mr. Carter): Do you know Dorothy Healey is the organizational secretary of the Communist Party of Los Angeles County?

“A. I am going to have to refuse to answer that question on the ground of self-incrimination.

“Q. Do you know whether Dorothy Healey has in her possession or under her control any books and records of the Communist Party of Los Angeles County?

“A. I wish to make the same answer.”

(Then he was directed to report down in Judge Hall’s court.)



(Testimony of E. L. Drummond.)

The Court: That concludes the questions and answers of this afternoon?

The Witness: Yes.

Mr. Carter: May the record show that Horace Morton Newman, Jr., has been present here since the beginning of these proceedings, and that Mr. Margolis, I take it, is his counsel and appearing for him.

The Court: You did not enter a formal appearance.

Mr. Margolis: That is correct. I guess this is the first court proceeding.

The Court: There was a contempt proceeding for failure to obey a subpoena.

Mr. Margolis: I was thinking there was an earlier hearing too, but at that time there was no court proceeding so I [78] guess this is the first court proceeding in this matter, and I will enter the appearance in the same manner as in the other cases.

Mr. Carter: May this matter be continued to the same date as Averbuck, Greenfield and Healey?

The Court: All further proceedings in connection with this matter will be continued to June 3rd at the hour of 10:00 o'clock in this courtroom, to which time you, Mr. Newman, are ordered and directed to be and return here at that date and hour.

Mr. Margolis: I would like to ask one thing: I would like to ask the court to request counsel for

(Testimony of E. L. Drummond.)

the government, so that counsel for the defendants may be given some indication, with respect to which of these questions they are going to make a motion to compel an answer. The reason I say this is because it is my opinion, from the way some of them were presented, the government intended to abandon some of them. I would like to know.

Mr. Goldschein: All of them.

The Court: All questions which he refused to answer?

Mr. Goldschein: Yes, sir.

Mr. Margolis: Even those where you said "I won't ask it again at this time"?

Mr. Goldschein: If the question has been withdrawn then of course he can't answer it. But all questions that [79] were asked and were not withdrawn, we expect him to answer.

Mr. Margolis: Very well.

The Court: June 3rd at 10:00 o'clock. The grand jury need not be present.

You have indicated to them when you desire them to return, Mr. Carter?

Mr. Carter: They are to return on call.

The Court: They will return on call.

Court is adjourned.

(Whereupon, at 5:10 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Friday, June 3, 1949.) [80]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of May, A.D., 1949.

/s/ AGNAR WAHLBERG,  
Official Reporter.

[Endorsed]: Filed July 28 1949. [81]

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June 9, 1949, 10:00 o'clock a.m.

\* \* \*

The Court: This matter was continued until this time for the purpose of hearing objections to the questions propounded by the grand jury on May 26th to Mrs. Healey, to Mr. Greenfield, to Mr. Averbuck and to Mr. Newman, each of whom are present in person and also by counsel.

Mr. Margolis: That is correct, your Honor.

The Court: Very well. I will hear your objections to the questions, or do you have a motion to make?

Mr. Goldschein: No, may it please the court. The court recessed and when the court recessed we suggested that the case be left in that condition without the government closing its case at that time.

The Court: Yes, I remember.

Mr. Goldschein: Now we would like at this time to call Mr. Tony Harry Adrean, a witness.

Mr. Adrean.

### TONY HARRY ADREAN

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Tony Harry Adrean. [4\*]

The Clerk: Take the stand, please.

Mr. Margolis: How do you spell that?

The Court: Tony?

The Witness: Harry.

The Court: Harry.

The Witness: Adrean.

The Court: A-d-r-i-a-n?

The Witness: A-d-r-e-a-n.

The Clerk: Your address?

The Witness: 4308 Normal Avenue, Los Angeles.

The Court: Proceed.

### Direct Examination

By Mr. Goldschein:

Q. How old are you, Mr. Adrean?

A. I will be 31 this month.

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\* Page numbering appearing at top of page of Reporter's original Transcript of Record.

(Testimony of Tony Harry Adrean.)

Q. What is your business?

A. I am a graduate student at the University of Southern California.

Q. Mr. Adrean, were you ever a member of the Los Angeles County Communist Party?

A. Yes, sir. I joined the Communist Party here in June 1942 and I resigned from it in the summer of 1947.

Q. Did you ever hold any official position with the party?

A. I was a club organizer and I was educational director [5] of a couple of clubs.

Q. In connection with your business with the Communist Party, did you learn who the officers of the party were in Los Angeles?

A. Yes, sir.

Q. Did you ever meet Mrs. Dorothy Healey?

A. Yes, sir.

Q. Can you tell us what position she held with the Los Angeles County Communist Party?

A. She held the position of organizational secretary and I believe also membership director.

Q. Can you tell us the duties of the organizational secretary and membership director?

Mr. Margolis: Objected to on the ground of insufficient foundation.

Q. (By Mr. Goldschein): Of the Los Angeles County Communist Party.

Mr. Margolis: I am sorry. I thought counsel had finished.



(Testimony of Tony Harry Adrean.)

I object on the ground of insufficient foundation.

The Court: On the ground of what?

Mr. Margolis: Insufficient foundation.

The Court: He is asking him if he knew. Do you know? [6]

Q. (By Mr. Goldschein): Do you know?

A. Yes, sir.

The Court: Very well.

The Witness: She has a control or executive position in the Communist Party. In other words, if anyone is to be kicked out of the Communist Party without a hearing and in violation of the party constitution, Dorothy Healey does it.

(Laughter)

The Court: Just a moment. We are going to have order preserved here and any witness who is on the witness stand is entitled not to be sneered at or laughed at or ridiculed or any comment of any nature made by any person in the audience concerning his testimony or his appearance or anything he says.

Mr. Margolis: Your Honor please, I move to strike that answer as not responsive and a voluntary matter outside of the framework of the question.

The Court: The motion is denied.

Had you finished your answer?

The Witness: No, sir, I hadn't.

The Court: The question was, do you know?

Q. (By Mr. Goldschein): Do you know her duties?  
A. Yes, sir. [7]

(Testimony of Tony Harry Adrean.)

Q. Tell them, please, sir.

A. Well, she is in control of the day-to-day activities of the party, the membership, its officers. If anyone wants to settle a dispute they go down to Dorothy Healey as the final arbiter. If anyone has business with the county and wants someone in an authoritative position to answer a question that they want to raise they go to see Dorothy Healey. If the question pertains to one of the functional offices of the party, such as the legislative director, she refers him to the legislative director or to one of the other functional officers of the Communist Party.

Q. Where is her office?

A. It is at 124 West Sixth Street.

The Court: What is the name of that building?

Q. (By Mr. Goldschein): Is that an office building?

A. Yes, sir. I believe that is the Gross Building. I am uncertain on that.

Q. What floor is she on, do you know?

A. Fifth floor.

Q. Were you ever in her office?

A. Yes, sir.

The Court: What is the room number? Do you know?

The Witness: No, sir, I don't know. [8]

Q. (By Mr. Goldschein): Were you ever in her office? A. Yes, sir.

Q. Do you see her in the courtroom?

A. Yes, sir.

(Testimony of Tony Harry Adrean.)

Q. Will you point her out, please, sir?

A. That lady sitting there next to Mr. Margolis.

The Court: The record will show that the witness has identified Dorothy Healey.

Q. (By Mr. Goldscheine): Is her office part of a suite or a group? A. Yes, sir.

Q. Is there any name on that suite of offices?

A. Well, it is the Communist Party of Los Angeles County, I believe. That is the name on the suite.

Q. Have you been to any other of the offices of that suite? A. Yes, sir.

Q. Do these offices generally have one desk or several desks?

A. Some of them have several desks.

Q. Have you been in some of those offices that have several desks?

A. Yes, sir, at least two of them.

Q. Were you in Mrs. Dorothy Healey's office?

A. I had to report to her when I got out of the Army. I couldn't be assigned to a Communist Party club without going down and being cleared through her and she assigned me.

Q. How many desks were there in her office?

A. I believe there was one desk and possibly a table. I am not clear.

Q. What was on the table?

A. A lot of junk.

The Court: Well——

The Witness: I don't know exactly.

(Testimony of Tony Harry Adrean.)

The Court: Papers you mean?

The Witness: I don't recall clearly. I believe there were papers and things like that on it.

Q. (By Mr. Goldschein): What do you mean by functional officers of the club, Mr. Adrean?

A. Well, I mean the way the party is organized it has these people responsible for the functional activity. It is set up on a functional basis.

Q. Such as?

A. Well, they have a legislative director, a membership director, a finance director, and so on.

The Court: Name them all if you can.

The Witness: I am sorry, I can't name them all. I can give you generally. [10]

Q. (By Mr. Goldschein): Just begin with the head. Who is the head of the Los Angeles County Communist Party? What do you call him?

A. I think he is the chairman of the County Central Committee.

Q. Do you know his name?

A. Nemmy Sparks.

Q. Who is the next in charge?

A. Dorothy Healey.

Q. What is her title?

A. Organizational secretary.

Q. Now who comes under the organizational secretary?

A. Well, then there is a group of functional officers such as the legislative director, the educational director, and so on.

(Testimony of Tony Harry Adrean.)

Also under her comes the——

The Court: Is there a membership director?

The Witness: It was my understanding, sir, that that was combined with Dorothy's position, at least when I got out of the Army. I had to report to her in order to be assigned to a club. That was my understanding at that time.

Mr. Margolis: I move to strike that understanding as constituting an opinion and conclusion of the witness and as not being competent admissible evidence.

Mr. Goldschein: The witness gave his explanation as to [11] why he was given to understand that that was her duties.

The Court: The motion is denied. Go ahead. I don't think he had finished answering.

The Witness: Also under her comes the various sections of the party, and they are headed by organizers. The organizers serve as the functional officers also.

Another functional officer is Phil Bock. He is the county youth director.

Then under the sections come the various clubs or the basic units of the party.

Q. (By Mr. Goldschein): Now by sections you mean what? Will you explain what you mean by sectional?

A. The organization is organized on both a territorial and a functional basis. In other words, the sections are territorial units. They will cover vari-



(Testimony of Tony Harry Adrean.)

ous areas of town, for example the Hollywood section, the midtown section and so on. Then there is an industrial section. It is organized on that basis.

Then there are these functional officers also, such as the legislative director, the county youth director, etc.

The Court: They operate countywise you mean?

The Witness: Yes.

The Court: Or does each section have a legislative director? [12]

The Witness: Then each section has a legislative director.

The Court: And a youth director?

The Witness: Well, that depends.

Q. (By Mr. Goldschein): Now were you ever required to fill out any statistical data for the Los Angeles County Communist Party?

A. Yes, sir.

Q. What did that consist of?

A. During registration periods in the party they had a mimeographed sheet come around which I had to state my name on or my party name——

Q. What do you mean by your party name?

A. Well, for security reasons we maintain, if you wish, party names. Mine was George Allen.

Q. You mean fictitious names?

A. Yes, sir.

The Court: Who gives you that name?

The Witness: I gave it to myself, sir.

The Court: You pick it?

(Testimony of Tony Harry Adrean.)

The Witness: Yes, sir.

Q. (By Mr. Goldschein): How does the party know which name you are selecting?

A. Well, I tell them. I let them know. [13]

On this statistical sheet, as I recall, I put down my name——

The Court: Your real name and your party name?

The Witness: No, sir, just my party name on that, if I recall correctly. That was in the spring of '47 the last time I filled out one of those.

The Court: Then what else did you put on it?

The Witness: Well, I had to state my location, what club I was in. I had to state my occupation, whether I belonged to some trade union, fraternal organization, whether I was a veteran. I had to give all this statistical information so that the county could, if they wanted to get their veterans together, they could get their hands on their veterans for a veterans' meeting. So that they would know how many people are located in a particular industry or in a particular trade union in order to organize activities within those various organizations.

Q. (By Mr. Goldschein): Where did that statistical data that you filled out go?

A. It went to the county.

Q. The county officers of the Los Angeles County Communist Party?      A. Yes, sir.

The Court: Did you deliver it? [14]

(Testimony of Tony Harry Adrean.)

The Witness: No, sir.

The Court: Did you mail it?

The Witness: No, sir.

Q. (By Mr. Goldschein): Who did you give it to and under what circumstances?

A. The way this interparty communication is set up, it is on what they call a centralized basis.

Mr. Margolis: Just a moment. I am going to object to this on the ground it is insufficient foundation. I think that this witness should be required to testify as to what he knows of his own knowledge and not to anything else.

The Court: Do you know?

The Witness: I know of my own knowledge how the organization is set up, how it communicates between the branches and the county. I know that from six years' experience in the party. I know that if I do something at the request of the club organizer or the county, it goes to the club organizer, he delivers it to the section and it is delivered to the county. That is the interparty communication. They don't use the mails in ordinary things of that nature.

The Court: What did you do with your—what did you call this, statistical data?

The Witness: Yes, sir. I turned it over to the club organizer and it was delivered through regular party channels.

Mr. Margolis: I move to strike that, if your Honor [15] please, as constituting hearsay, not

(Testimony of Tony Harry Adrean.)

based upon any knowledge on the part of this witness, and I ask the court to instruct the witness that his answer should be confined to what he personally did or what he personally saw and thus knows from his own knowledge. Not what he thinks was done by somebody else.

The Court: The motion is denied. Proceed.

Mr. Goldschein: That is all.

The Court: Cross-examine.

Mr. Margolis: Had you finished?

Mr. Goldschein: Yes. [16]

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Mr. Margolis: At this point, your Honor will recall that at the last session it was stated by all parties that it would be satisfactory to rely upon the record in former cases instead of putting in the testimony all over again.

The Court: Yes.

Mr. Margolis: And I wish at this time, your Honor, to offer as an exhibit here the printed record in the following cases: Nos. 12217 and 12221, in the United States Court of Appeals for the Ninth Circuit, being the cases of Samuel Harry [37] Kasinowitz and consolidated cases, and Lillian Adele Doran and consolidated cases, and consisting of——

The Court: Well, there is one of those that is entitled Alexander and consolidated cases.

Mr. Margolis: I was about to explain that, your Honor—consisting of four volumes. In these four volumes there is incorporated by reference previous

cases so that these four volumes contain the complete record on appeal of all of the grand jury cases arising out of the so-called investigation of loyalty of government employees.

The Court: Up to this time.

Mr. Margolis: Up to this particular proceeding.

The Court: Very well. In other words, that is a transcript of everything which has occurred before me heretofore?

Mr. Margolis: Except as to those parts of the record which neither party designated on appeal. In other words, we designated certain portions of the transcript, the government designated certain portions of the transcript, and we omitted argument and things of that kind.

The Court: What I am getting at is that everything that is in that has transpired before me in the other cases.

Mr. Margolis: That is correct.

The Court: While that is not everything that has transpired.

Mr. Margolis: That is correct. [38]

The Court: Very well.

Mr. Margolis: I ask your Honor that these be marked in evidence here and that the matters therein be considered as having been presented in this case on behalf of the respondents, and each of them, in this case, as though they have been presented in the first instance in this case by witnesses and evidence, documentary evidence, and that the



court's rulings with respect to objections be deemed to have been made in this case, and that the offers of proof following sustaining of certain objections be deemed to have been made in this case on behalf of these respondents.

In other words, the purpose being, without repeating the proceedings——

The Court: Excuse me. May I interrupt you? You said the “matters.” Do you mean the matters of law and of fact?

Mr. Margolis: That is right.

The Court: Very well.

Mr. Margolis: The purpose being to get this record before the court on behalf of these defendants without going to the trouble of repeating them. That is the object of this offer.

I think counsel is familiar with these transcripts.

Mr. Goldschein: I am familiar with the transcripts and for that reason I can't see, may it please the court, why the facts in these cases are material to the case at bar. [39]

I can understand why Mr. Margolis would want the offers of proof made in the former cases made as offers of proof in this case, but what the facts in the other cases have to do with the facts in this case I don't know. I see no reason for encumbering this case with what transpired previously in other cases.

The Court: The only encumbrance is the matter of record. As far as I am concerned I am already

encumbered with it, if it can be called encumbrance.

Mr. Goldschein: I understand.

The Court: I think without passing upon the materiality of each specific thing, it must be kept in mind that the whole proceedings which were begun last October by the grand jury were in the matter of the investigation of the loyalty or false oath of government employees.

Mr. Goldschein: Yes.

The Court: And it would seem to me to be therefore a pretty broad range of materiality. I see no objection to following the procedure suggested.

Mr. Goldschein: Except we have four volumes here. Now we will have five volumes coming up this next time if the case goes up, and the next case will be six volumes, and the next case will be seven volumes. There ought to be a limitation to cases.

Mr. Margolis: I think so too. There ought to be an [40] answer to these cases sometime.

Mr. Goldschein: There aren't going to be.

Mr. Margolis: There aren't going to be?

Mr. Goldschein: No, sir, not as long as the grand jury is defied will we stop these cases.

Mr. Margolis: Until the Appellate Court tells you otherwise.

Mr. Goldschein: Of course we always abide by orders of the court, and if you people will it will end it quickly.

I am sorry for the side remarks, your Honor. I didn't intend making it here.

I don't see what the previous cases or the merits of the previous cases have to do with the case at bar, your Honor. Here we have three people before the court now——

Mr. Carter: Four.

The Court: Counsel, at the inception Mr. Margolis and his co-counsel offered many items of legal objections to the questions. They proffered certain things in evidence, some of which were received and some of which were objected to upon the grounds assigned and were rejected. I can see no wrong with counsel's offer.

Mr. Goldschein: I agree with that.

The Court: That all of these matters which he has heretofore mentioned, whether it is in that printed record or not, be deemed to be offered and in evidence or rejected in [41] this matter here.

Mr. Goldschein: That is right.

The Court: All it does is saves making five more volumes like that.

Mr. Goldschein: I make no objection to that, may it please the court.

The Court: Very well. That is the end of it then.

Mr. Goldschein: But I do object to the four volumes of testimony.

Mr. Margolis: I don't understand that.

Mr. Goldschein: These are records, a complete record in the case, the evidence of the case, what the witnesses said, the examination, the cross-examination, the offers of proof and the objections made to

them, the rulings of the court—all that may be considered in this case as they were offered and made in the other case. We make no objection to that at all.

Mr. Carter: Maybe I can straighten this out. I think Mr. Goldschein is objecting to the offer of the volumes in evidence. Supposing they are marked for identification only with the privilege to counsel to rely upon them insofar as any ruling on any matter of law or any offer of proof is concerned. Then they are not in evidence but they are a record of the Circuit Court and are available to counsel.

The Court: I can straighten it out very quickly, and I [42] will do so right now, unless Mr. Margolis objects, that everything which has heretofore been offered, either as a matter of fact or a matter of law, in any and each and all and every one of the previous cases may be deemed to have been offered and submitted and argued in this case to the same force and effect and with the same rulings as if again here repeated as they were in the other case.

Mr. Margolis: That is satisfactory. I was merely offering the record, your Honor, as a means of sort of having it before the court.

The Court: I am happy to have it. It saves me going through 15 or 20 transcripts.

Mr. Margolis: I don't care whether it is marked for identification or in evidence.

The Court: It is all deemed as a part of the

record. If it is evidentiary, it is in evidence; if it is an offer of proof, it is an offer of proof, with the same ruling on it; if it is an objection of law, it is deemed to have been made with the same ruling.

Mr. Carter: Your Honor in referring to evidentiary matters is referring only to evidentiary matters in connection with motions and whatnot, with the evidentiary matters of other witnesses who were before the grand jury, or do you include that too?

The Court: You might just as well let it all go in. [43]

\* \* \*

#### E. L. DRUMMOND

called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: You are Mr. E. L. Drummond, the same Mr. Drummond who was sworn before in these proceedings?

The Witness: Yes, sir.

The Court: Very well.

#### Cross-Examination

By Mr. Margolis:

Q. Mr. Drummond, as I understand it you have, since the beginning of what has been referred to as the investigation by the grand jury concerning loyalty of government employees, acted as a court reporter in the grand jury proceedings, is that correct? A. In some of them, yes. [44]



(Testimony of E. L. Drummond.)

Q. And the some of them included the grand jury proceedings concerning which you have testified and others concerning which you have not testified, isn't that correct?

A. Concerning these four cases and also the previous case where ten defendants were involved.

Q. But you have not read into the record here all of the testimony which you have taken as a court reporter in those grand jury proceedings, have you?

Mr. Goldschein: I object to the question, may it please the court.

Mr. Margolis: It is preliminary, your Honor.

Mr. Goldschein: Let him ask him whether he read all the testimony, not that he didn't.

The Court: Let me hear the question.

(The question referred to was read by the reporter as follows:)

(“Q. But you have not read into the record here all of the testimony which you have taken as a court reporter in those grand jury proceedings, have you?”)

Mr. Goldschein: I object to the form of the question.

The Court: It is leading.

Mr. Margolis: I thought this was cross-examination, your Honor. I thought leading questions were proper on cross-examination. [45]

The Court: I believe it is cross-examination of this witness. The objection is overruled.

(Testimony of E. L. Drummond.)

Mr. Goldscheine: I withdraw the objection.

The Witness: I have read all of the testimony of the witnesses that I was asked about here.

Mr. Margolis: I am sorry. I didn't get the answer.

(The answer referred to was read by the reporter as follows:)

("A. I have read all of the testimony of the witnesses that I was asked about here.")

Q. (By Mr. Margolis): What I want to know is whether there is testimony that you took before the grand jury that you haven't read into the record here because you have not been asked to read it into the record. A. Yes.

Q. Now do you have the records of that testimony here?

A. I have the record of these four witnesses.

Q. I am going to put a question to you which I am going to presume there is going to be an objection to, but if it is answered it will require you to examine your records, but I will put it to you now and if the question is allowed you will have an opportunity to examine your records.

State whether or not during the course of the grand jury proceedings, which we have been talking about, referred to as [46] the investigation by the grand jury concerning loyalty of government employees, Mr. Carter or Mr. Goldscheine or anyone else acting on behalf of the United States Attorney's office made any statement to the effect that

(Testimony of E. L. Drummond.)

Dorothy Healey was a member or officer of the Communist Party to the said grand jury.

Mr. Carter: Objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Carter: The record should further show the objection is based upon the further ground that the proceedings before the grand jury are confidential.

The Court: The objection is sustained.

Mr. Carter: I would like the record to have more than the general objection in there, that there is no obligation upon the prosecutor to reveal all of the testimony taken before this grand jury, that there were various witnesses called, and I will say for the record generally, without mentioning names, that some of the government employees themselves have been before the grand jury. It is not the law that any of that testimony or any of the proceedings other than the part which has been submitted here is properly presented before this court.

The Court: The objection is sustained on the ground it is immaterial. [47]

Q. (By Mr. Margolis): I will ask you the same question, sir, as the last one with respect to whether or not Elvador Greenfield was stated to be a member or officer of the Communist Party before said grand jury.

Mr. Goldschein: Will you repeat the question, please?

(The question referred to was read by the reporter as follows:)

(Testimony of E. L. Drummond.)

(“Q. I will ask you the same question, sir, as the last one with respect to whether or not Elvador Greenfield was stated to be a member or officer of the Communist Party before said grand jury.”)

Mr. Goldschein: Same objection, may it please the court.

Mr. Margolis: May I be heard for just a moment?

The Court: Surely.

Mr. Margolis: The cases all hold that the setting in which the investigation was being conducted, which includes anything which would indicate knowledge on the part of the government of matters which the government might charge to be criminal in character, is material to show the danger which the recalcitrant witness fears. And, your Honor, if this government counsel, which has repeatedly said, we are not investigating these defendants—or in this case they are [48] still respondents—these respondents, or anyone except certain government employees, but which is the same government which is prosecuting persons for membership and officership in the Communist Party in New York, if these officers of the government have stated before the grand jury that they have information to the effect that any one of these persons is a member of or an officer of the Communist Party, that is a part of the setting which shows the fear, or the basis for the fear, of danger of

(Testimony of E. L. Drummond.)

prosecution upon the basis of which they have the right to claim the privilege against self-incrimination.

That is our point, your Honor. We think it is material.

The Court: I understand your point. It is the same point you have urged before.

Mr. Goldschein: I think, may it please the court, that if the witness were asked whether or not he transcribed all the testimony of witnesses before the grand jury or statements made to the grand jury, whether or not there are any statements made to the grand jury that he did not put in his record, he would come closer to it. The best evidence of what was said in the grand jury is whether or not he took it down, whether it is in the transcript. If it is in the transcript then the transcript is the best evidence.

Now is he looking for transcripts or is he looking for something outside of the record? [49]

The Court: The objection to the pending question is sustained on all the grounds assigned by government counsel.

Proceed.

Mr. Margolis: Including this last ground, your Honor? I did not understand it.

The Court: Not the last ground. ,

Mr. Carter: May we have one moment for discussion?

The Court: Yes.

(Conference between government counsel.)



(Testimony of E. L. Drummond.)

Mr. Carter: We are going to withdraw the objection that has heretofore been made and ask the court to set aside its ruling on the two questions that have heretofore been asked by counsel, reserving the right to make other objections to other questions if and when they are asked.

The Court: Very well. Mr. Reporter, can you go back to the last previous question about Dorothy Healey?

(The question referred to was read by the reporter as follows:)

(“Q. State whether or not during the course of the grand jury proceedings, which we have been talking about, referred to as the investigation by the grand jury concerning loyalty of government employees, Mr. Carter or Mr. Goldscheim or anyone else acting on behalf of the United States Attorney’s office made any statement to the effect that [50] Dorothy Healey was a member or officer of the Communist Party to the said grand jury.”)

The Court: You have no objection to this witness answering that question?

Mr. Carter: No objection.

The Witness: I don’t remember any such statement. However, I was called in immediately before Mrs. Healey was. I don’t know what transpired before that.

Q. (By Mr. Margolis): I don’t mean on just

(Testimony of E. L. Drummond.)

this one session, I mean during the entire course of the investigation, Mr. Drummond.

A. I have no remembrance of any such statement. I can only depend on my notes to remember what did occur.

Mr. Margolis: I wonder if I might, your Honor, from the standpoint of saving time, ask the witness this question and the next one that I ask and several others, and then ask him to check his notes so that we can have it done just once instead of several times.

Mr. Carter: That is satisfactory.

The Court: Go ahead.

Q. (By Mr. Margolis): You understand that I have already put the same question to you concerning Elvador Greenfield?                   A. Yes, sir.

Q. I want to put the same question to you concerning [51] Alvin Averbuck.

A. The answer would be the same.

Q. And I want to put the same question to you with respect to Horace Morton Newman, Jr.

A. The answer would be the same there.

Q. During the course of this investigation did you hear any witness testify before said grand jury that Dorothy Healey was a member or officer of the Communist Party?

A. I think not.

Q. But you can check your notes on that at the same time?                   A. Yes, sir.

Q. I will ask you the same question with respect

(Testimony of E. L. Drummond.)

to Elvador Greenfield, Alvin Averbuck and Horace Morton Newman, Jr., and ask you when you check your records to check that also.

A. Yes, sir.

Q. Was there any statement made during the course of the grand jury investigation by any representative of the United States Attorney's office, including Mr. Carter and Mr. Goldschein, to the effect that the Communist Party was an illegal conspiracy?

Mr. Goldschein: May it please the court, I am assuming that all these questions pertain to matters outside of the record that Mr. Drummond has heretofore testified in this [52] court and the records of the grand jury transcripts that he testified about here.

The Court: Yes, I assume that.

Mr. Margolis: I would be wasting time if I was referring to what is already in the evidence.

Mr. Goldschein: The witness doesn't know and the record doesn't show it.

The Court: Read the question.

(The question referred to was read by the reporter as follows:)

(“Q. Was there any statement made during the course of the grand jury investigation by any representative of the United States Attorney's office, including Mr. Carter and Mr. Goldschein, to the effect that the Communist Party was an illegal conspiracy?”)

(Testimony of E. L. Drummond.)

Mr. Carter: Just a moment. You say during the grand jury investigation. You are not talking about some sidewalk conversation that might have occurred while the grand jury investigation was going on, do you? You refer to while the grand jury investigation was going on and before the grand jury, is that right?

Mr. Margolis: This question does, but you give me an idea for another question.

Mr. Carter: It is objected to upon the ground it is indefinite [53] and uncertain as now worded.

The Court: Objection sustained.

Q. (By Mr. Margolis): I will limit the question to the grand jury, the proceedings before the grand jury.

Mr. Carter: Then we have no objection.

Q. (By Mr. Margolis): Now I will ask you——

The Court: The witness has not answered.

Mr. Margolis: I thought this was something we would have to check in the record.

The Court: Maybe he can answer it now.

The Witness: If there was any such statement made I did not report it because I report only the testimony of witnesses and I have no remembrance of any statement of that sort.

Q. (By Mr. Margolis): You didn't report anything except the testimony of the witnesses?

A. No, sir.

Q. Were there comments made and statements made in addition to the testimony? Was there dis-

(Testimony of E. L. Drummond.)

cussion in the grand jury room while you were there?

A. I presume there was, but I don't recall any such.

Q. You didn't pay any particular attention to that?

A. I didn't pay any particular attention to that because [54] that is not part of my job.

Q. Let me ask you this question: Have you ever, in any conversation with Mr. Carter or Mr. Goldscheine, been told by either one of them that they consider the Communist Party of the United States to be an illegal conspiracy?

Mr. Carter: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Margolis: I have no further questions at this time, your Honor.

I ask that the witness—yes, I do have one more question.

Q. There were other reporters or another reporter who transcribed portions of these grand jury proceedings which you did not transcribe, is that correct? A. Yes, sir.

Q. Do you know who that other reporter or reporters were?

A. I think that Frances Duffy had some of it.

The Court: A lady reporter?

The Witness: Yes. But I don't know who they all were.



(Testimony of E. L. Drummond.)

Q. (By Mr. Margolis): You don't remember who the others were?

A. No, but there is a record in the office of the General Reporting Company as to who the reporters were. [55]

Q. Could you get that information for me?

A. I could.

Q. Along with the others? A. Yes.

Mr. Margolis: I ask, if your Honor please, that this witness at this time, subject to counsel's further examination, be allowed to examine his records and to come back to testify further rather than to delay these proceedings.

The Court: How long will it take you to go through your notes and answer these questions about Healey, Averbuck, Greenfield and Newman?

The Witness: I can answer the question as to those right now.

The Court: You can answer as to those right now?

The Witness: Yes, sir. There is nothing further than what I have read here in court on any of those.

The Court: He said there is nothing further than what he has read heretofore in court.

Q. (By Mr. Margolis): Do you know that without checking your records?

A. I have my record right here.

Q. You understand that my question went not only to the testimony taken on the particular day

(Testimony of E. L. Drummond.)

that the four respondents here were called in to testify, but to during the entire course of this grand jury investigation which started [56] a number of months ago. Did you so understand my question?      A. I understood that.

Q. And your answer is still, though, that you have nothing and you know that without checking your records, Mr. Drummond?      A. I do.

Mr. Margolis: Very well, your Honor. I have no further questions.

The Court: Step down.

(Witness excused.)

Mr. Margolis: I will ask Mr. Carter to take the stand.

The Court: I do not believe he has been sworn in this case.

### JAMES M. CARTER

called as a witness by and in behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name for the record?

The Witness: James M. Carter.

Mr. Goldschein: May it please the court, these proceedings are informal, as I understand it, on the matter of procedure, that is, with reference to placing witnesses on the witness stand. I just recall that we have another witness in this case that we will want to put on.

(Testimony of James M. Carter.)

Now will there be any objection to putting him on after [57] Mr. Carter has completed his testimony?

Mr. Margolis: I understood the government had closed its case, your Honor.

The Court: That was my understanding.

Mr. Goldschein: Yes, we had. This is something that I overlooked.

The Court: Do you desire to reopen it and put him on now?

Mr. Goldschein: Yes, sir. Either now or at the conclusion of Mr. Carter's testimony.

The Court: I have no idea what Mr. Margolis wants to examine this witness about and I assume that if you have any more witnesses you should put them on first.

Mr. Goldschein: That is all right if it is all right with Mr. Margolis.

Mr. Margolis: I object to the government's case being reopened but if the court overrules my objection I would prefer to wait until the government's case is in.

Mr. Goldschein: All right. We are ready now. Step down, Mr. Carter, please, sir.

(Witness excused.)

Mr. Goldschein: We want to produce Mr. Margolis, please.

The Court: You call Mr. Margolis to the witness stand?

Mr. Goldschein: Yes.

The Court: Very well. [58]

Mr. Margolis: Your Honor please, before I am sworn I want to object to the reopening to call me because this is an oversight. This is an obvious attempt to get back at calling Mr. Carter, and I object to the matter being reopened.

The Court: Objection overruled. You will be sworn. [59]

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### FRANCES L. DUFFY

called as a witness by and in behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Frances L. Duffy.

The Clerk: Take the stand, please.

#### Direct Examination

By Mr. Margolis:

Q. Miss Duffy, you are an official court reporter here? [75]

A. I am for the grand jury and the pro tem of the Federal Court.

Q. Have you been a court reporter in connection with the grand jury hearings which have been entitled In the Investigation by the Grand Jury Concerning Loyalty of Government Employees?

A. Yes, sir. I took several of those hearings.

Q. Now during the course of the hearings which you took, did you just take down the testimony or did you take down everything that was said while you were in the room?

A. I took down everything that was said while I was in the room. I wasn't in the room all the time, of course you understand.

Q. Were there times when you were out of the room and when there was no reporter in the room to your knowledge?

A. Well, sometimes when I would get there they wouldn't be ready for me, the grand jury would not call me in immediately.

Q. They would call you in and there had been no reporter in there in advance of you, is that right?

A. Yes, sir.

Q. Now during the time that you reported the proceedings of the grand jury or were present in the grand jury room for the purpose of reporting proceedings of the grand jury in [76] connection with the proceedings we are talking about, did you at any time hear Mr. Carter, Mr. Goldschein or any other representative of the United States Attorney's office state to the grand jury that Dorothy Healey was a member or official of the Communist Party?

A. No, I am very sure I did not.

Q. Would you have to check your records in order to be sure on that?

A. No, I am sure I didn't. I took a whole group of the hearings but I am sure I would remember if I had heard that.

Q. I will ask you the same question with respect to Alvin Averbuck.



A. No, I don't think I ever heard the name.

Q. I will ask you the same question with respect to Horace Morton Newman, Jr.

A. No, I never heard anything about him.

The Court: How about Elvador Greenfield?

Mr. Margolis: I was going to ask that.

Q. I will ask you the same question with respect to Elvador Greenfield.

A. I never heard anything about him, I am very sure.

Q. Did you, during the course of the time that you were reporting the grand jury proceedings or present in the grand jury room in these proceedings hear any witness testify [77] with respect to any of these persons whom I have just named?

A. I heard various witnesses asked if they knew Dorothy Healey. I never heard anyone say whether they did or not.

Q. Did you during the course of these investigations hear any representative of the United States Attorney's office, including Mr. Carter and Mr. Goldschein, say anything with respect to whether or not the Communist Party was, in their opinion, an illegal conspiracy?

A. No, I never heard that.

Q. You don't recall that?

A. I am sure I never heard that.

Mr. Margolis: I have no further questions.

The Court: Step down. [78]

(Testimony of James F. Carter.)

JAMES M. CARTER

resumed the stand and testified further as follows:

The Court: I believe you were sworn this morning, Mr. Carter?

The Witness: I was.

Direct Examination

By Mr. Margolis:

Q. Mr. Carter, I direct your attention to the reporter's transcript of proceedings in this matter for May 26, 1949, and particularly to page 66, line 12 thereof, and if you will read along with me.

Incidentally, the portion I am reading purports to be you speaking.

“The federal law provides that if a person makes a false statement to the agency which employs him or to any federal agency, he has committed a crime. These subjects as part of the government's loyalty program were asked whether or not they were or had been members of the Communist Party and they stated they were not and had not been members of the Communist Party. It therefore becomes material to find out whether they told the truth or lied about the matter. It is a matter of considerable importance to them, because their jobs, and their reputations and whether or not they would be prosecuted [98] for a crime hinges upon the ascertainment of that fact.

“That is what we are trying to find out. We have had information indicating Dorothy Healey either has the membership records or knows where

(Testimony of James F. Carter.)

the membership records are of the Communist Party of Los Angeles County.

“We have had a subpoena issued for her. We have been unable to serve her and we therefore called you in to get some information. You are not under investigation. We are not investigating you. We are not investigating your activities. If we ever start to investigate them, let me assure you it will be a good bit different investigation than the one which is being conducted.”

Does this correctly report, not everything that you said, but is this a correct report of what you said so far as it goes?

A. As I recall, it does.

Q. Does this correctly state the purposes of this investigation?

A. I would say it does, having in mind that reference was being made to the subjects and these witnesses were none of them subjects. That has been previously explained to the grand jury. The subjects were some four or five or more government employees. They were the people under investigation. These people were not.

Q. And the purpose of the investigation since its inception—I think that was in October, wasn't it, of 1948?

The Court: Excuse me, counsel. You were reading from page 66 of the transcript in this court on May 26th, which was the court reporter repeating what had occurred before the grand jury on April 21?

(Testimony of James F. Carter.)

Mr. Margolis: That is right.

The Court: With Mr. Newman before them and this was the reporter's testimony of Mr. Carter's statement to Mr. Newman on that date?

The Witness: Right.

Q. (By Mr. Margolis): So the fact is that ever since the beginning of this investigation, which you have called investigation by the grand jury concerning loyalty of government employees which I believe was some time in October of 1948, it has been the purpose of the investigation as stated here, is that correct?

A. Generally speaking, yes.

Q. Had there been any other purposes?

A. No, that is the general purpose, in connection with the loyalty of these government employees who were subjects.

Q. When you say general purpose, are you intending to mean that this doesn't accurately state the purpose? [100]

A. No, it accurately states it.

Q. So actually you had a group of employees who signed affidavits saying that they were not members of the Communist Party, is that right?

A. I don't know what you mean by a group. I told you I originally had four cases and subsequently there were a few more.

Q. And those people had signed affidavits stating that they were not members of the Communist Party?

A. I don't know if they were affidavits. In some

(Testimony of James F. Carter.)

cases they may have been an unsworn statement, but they were a false statement.

Q. That they are not members of the Communist Party? A. That is right.

Q. And you conducted this investigation with respect to the Communist Party of Los Angeles County because you had information to the effect that the Communist Party of Los Angeles County was a part of the Communist Party with respect to which you believe these employees had made false statements, isn't that so?

Mr. Carter: Objected to on the ground it assumes a fact not in evidence. It assumes an investigation was conducted into the Communist Party of Los Angeles County, which is not a fact.

Mr. Margolis: That isn't the question. [101]

The Court: Let me hear the question.

(The question referred to was read by the reporter as follows:)

(“Q. And you conducted this investigation with respect to the Communist Party of Los Angeles County because you had information to the effect that the Communist Party of Los Angeles County was a part of the Communist Party with respect to which you believe these employees had made false statements, isn't that so?”)

Mr. Carter: Objected to upon the ground that it assumes something not in evidence, a fact that has not been shown to exist, namely, an alleged in-



(Testimony of James F. Carter.)

investigation into the Communist Party of Los Angeles County.

Objected to upon the further ground that the question calls for information in the possession of the prosecutor that he might or might not desire to offer and that he has a privilege against revealing in this proceeding.

The Court: Let me hear the question again.

(The question referred to was reread by the reporter as follows:)

(“Q. And you conducted this investigation with respect to the Communist Party of Los Angeles County because you had information to the effect that the Communist Party of Los Angeles County was a part of [102] the Communist Party with respect to which you believe these employees had made false statements, isn’t that so?”)

The Court: It assumes a fact not in evidence, that is to say, it assumes that the investigation being conducted by the grand jury and the purpose and object of it is to investigate the Communist Party. There certainly have been questions developed here today and questions with the last four witnesses, and particularly Mrs. Healey, relating to the organization and activity of the Communist Party. I cannot say, however, that that is the purpose of the investigation by the grand jury. It appears to be merely a corollary investigation for the purpose of getting information from which other information can be obtained concerning membership.

(Testimony of James F. Carter.)

The objection is sustained on the ground indicated.

Q. (By Mr. Margolis): Isn't it a fact, Mr. Carter, that you have made an investigation attempting to discover the records and membership of people in the Communist Party of Los Angeles County because you had information or believed that this Los Angeles County Communist Party was a part of the Communist Party with respect to which certain government employees had allegedly made false statements?

The Court: Let me hear that question again.

(The question referred to was read by the reporter as [103] follows:)

("Q. Isn't it a fact, Mr. Carter, that you have made an investigation attempting to discover the records and membership of people in the Communist Party of Los Angeles County because you had information or believed that this Los Angeles County Communist Party was a part of the Communist Party with respect to which certain government employees had allegedly made false statements?")

The Witness: May I have the question again?

The Court: Yes.

(The question referred to was reread by the reporter as follows:)

("Q. Isn't it a fact, Mr. Carter, that you have made an investigation attempting to discover the records and membership of people

(Testimony of James F. Carter.)

in the Communist Party of Los Angeles County because you had information or believed that this Los Angeles County Communist Party was a part of the Communist Party with respect to which certain government employees had allegedly made false statements?")

Mr. Carter: I object to that question on the ground it is ambiguous and uncertain, indefinite, confusing. It is difficult for me to understand it. I have heard it three times now and I do not understand it. I object to it further on [104] the ground that it is not understandable.

I will state, however, that I conducted an investigation of certain witnesses to ascertain from them whether or not government employees under investigation had made false statements.

Mr. Margolis: That is very informative. I will submit the question. It seems to me it is perfectly clear, your Honor.

The Court: It is not clear to me. I do not know whether your question is, is it not a fact that you conducted an investigation, or is it not a fact because——

Mr. Margolis: Let me try to A B C it then, your Honor.

Q. It is true, is it not, that during the course of this investigation you asked numerous questions relating to the organization of persons who were officers of and had the membership records of the Communist Party of Los Angeles County. That is true, is it not?

(Testimony of James F. Carter.)

A. True, except the statement as to numerous questions. I would say there were some questions but the majority of the questions were not on that score. The questions were asked concerning the organization of the Communist Party of Los Angeles County. That is correct.

Q. The reason that you asked those questions was because you believed or had information to the effect that the Communist Party of Los Angeles County was part of the Communist [105] Party with respect to which you believed government employees had made false statements. That is so, isn't it?

Mr. Carter: I object to that question insofar as it calls for any information that I might have in my possession.

I will state, however—this may answer your question—that the inquiry was conducted to see whether these government employees who were under investigation were or had been members of the Communist Party of Los Angeles County.

Q. (By Mr. Margolis): And the reason for that was because you had information and believed that the Communist Party of Los Angeles County was part of the Communist Party. Isn't that so?

The Court: I do not understand that question. I would not know how he could answer it.

Mr. Margolis: I don't know.

The Witness: I think I have answered his question.

The Court: The Communist Party of Los An-



(Testimony of James F. Carter.)

geles County is part of the Communist Party?

Mr. Margolis: That is right.

This Mr. Carter has stood up in this very court and has said to your Honor, I don't know whether the Communist Party of Los Angeles County is part of the Communist Party. He has said that in this very courtroom.

The Witness: I still don't know.

Mr. Margolis: Then I have a right to ask this question, [106] whether he acted upon the basis of information and belief to that effect.

The Court: I do not think that it is necessary for a prosecutor to have information or belief in conducting an inquiry. He conducts an inquiry. It is immaterial. The objection is sustained.

Mr. Margolis: May I be heard on it?

Here they said the purpose of this investigation was to find out whether people had sworn falsely or had spoken falsely when they said they were not members of the Communist Party. If they came in and said, are you a member of the Elks——

The Court: Of the what?

Mr. Margolis: Of the Elks, or any other organization like that, I assume that that on its face would have been obvious that they weren't pursuing that line of inquiry as they contended.

Now here Mr. Carter has said in this court, and has argued to this court, that we could not show self-incrimination on behalf of our defendants because we had not shown that the Communist Party and the Communist Party of Los Angeles County



(Testimony of James F. Carter.)

appeared to be the same organization. And I want to show here, and I offer to prove through this witness if she is allowed to answer, or ordered to answer these questions, that at all times at a time when he was standing up here before this court making those representations as an officer of the court and as an officer of the United States government, he was acting upon the basis that the Communist Party of Los Angeles County was a part of the Communist Party, and that he was not acting in good faith as an officer of this court when he made those representations.

And, incidentally, when he made them before Judge Denman in San Francisco.

The Witness: I will answer your question.

The Court: It is immaterial whether he was acting in good faith or not. I have ruled on the question. The question is immaterial.

Mr. Margolis: Your Honor, I am not offering it for showing lack of good faith, I am offering it for the purpose of showing information.

The Court: That is what you said you were offering it for.

Mr. Margolis: No. I don't insist on that.

My point is, your Honor, that there has been a question raised——

The Court: The question has been asked and it has been ruled on. Now let us proceed. Have you any more questions to ask? If so, ask him.

Q. (By Mr. Margolis): Did you ask the questions with respect to the Communist Party of Los

(Testimony of James F. Carter.)

Angeles County because you believed them [108] to be material to an inquiry as to whether or not certain government employees were or were not members of the Communist Party?

A. Let me say this first, if I may, before answering your question——

Mr. Margolis: If your Honor please, I think this man is a witness and he ought to answer the question.

The Court: I think that by this time I can take judicial notice of the fact that Mr. Carter considers all of the questions which he has asked material because he has affirmed it repeatedly in this court that they were material to the inquiry.

The Witness: I will answer that question and say that I thought my questions were material to the issues as to whether or not these employees were members of the Communist Party of Los Angeles County.

By Mr. Margolis:

Q. But you have stated here, and you have said this was the purpose of the investigation, that these government employees had said that they were not and never had been members of the Communist Party. Now would you please answer this question, whether you considered the questions with relation to the Communist Party of Los Angeles County material to that inquiry which you have said was the purpose of all these proceedings? [109]

A. I don't know personally, without reference to files, how many Communist Parties there are.

(Testimony of James F. Carter.)

The use of the word "Communist Party" on page 66 was a general term. I didn't have before me at that time the case report on each particular employee. I don't know whether the particular government employee had specified that he had not been a member of this Communist Party or another Communist Party or what Communist Party. But my questions were material to the inquiry, had that employee been a member of the Communist Party of Los Angeles County. Once we ascertained that we then could find out, if we needed to, if there were other Communist Parties that we would have to inquire into.

Q. (By Mr. Margolis): In other words, you were just sort of groping in the dark when you were asking these questions? You didn't have any information or any reason to believe that there was any connection between the Communist Party of Los Angeles County and the Communist Party?

A. I was making an inquiry into the Communist Party of Los Angeles County in so far as it concerned these employees.

Q. And you had no reason whatsoever to believe or to suspect——

The Court: Counsel, I do not know what is meant by the distinction which is continued to be made here between the Communist Party of Los Angeles County and the Communist Party. [110] Is the Communist Party designated as the Communist Party of the United States? Are they the Communist Party?

(Testimony of James F. Carter.)

Mr. Margolis: Here he refers to the Communist Party, your Honor please. Your Honor himself has said from this bench that you don't know any relationship between the Communist Party and the Communist Party of Los Angeles County. Your Honor said that in these proceedings at an earlier time. I am trying to prove that the government has been acting upon the basis of that sort of a connection, and I think this is part of the setting and I have a right to show it. The government has stood up here in court and denied it, that this is the basis on which they were acting. And they thought it was material enough to deny it, and if it was material enough to deny it, and I have a statement here to the contrary, I should be allowed to ask questions with respect to it.

The Court: The inquiry is immaterial.

Mr. Margolis: I offer to prove if this witness were allowed to answer——

The Court: Ask your questions and I will rule on them. I have already ruled that this is immaterial.

Mr. Margolis: I am making an offer of proof, your Honor, please.

That this witness would testify that the reason for asking the questions concerning the Communist Party of Los Angeles County was because he was acting upon the basis that the [111] Communist Party of Los Angeles County was part of the Communist Party with respect to which he had information concerning false statements.



(Testimony of James F. Carter.)

Mr. Goldschein: Do I understand by that that Mr. Margolis has evidence of that fact, that he says he is going to prove it?

The Court: Yes, he says he offers to prove.

Mr. Margolis: I offer to prove it and I assume that Mr. Carter is going to testify truthfully. I make that assumption.

Mr. Goldschein: He is going to prove an assumption now.

Mr. Margolis: I have made my offer of proof and it can be objected to or not.

The Court: Let me hear it. Maybe that is what the government and the grand jury are looking for. Let me hear your offer of proof. That might terminate this investigation if you can prove that.

(The record referred to was read by the reporter as follows:)

("Mr. Margolis: I am making an offer of proof, your Honor please.

"That this witness would testify that the reason for asking the questions concerning the Communist Party of Los Angeles County was because he was acting upon the basis that the Communist Party of Los Angeles [112] County was part of the Communist Party with respect to which he had information concerning false statements.")

The Court: I do not understand your offer of proof.

Mr. Margolis: I will let it stand, your Honor.

The Court: It is rejected then on the ground



(Testimony of James F. Carter.)

that it is incapable of comprehension and therefore is immaterial.

Q. (By Mr. Margolis): On or about January 26, 1949, you or someone in your office obtained an order from the presiding judge of this court for the continuance of the grand jury which otherwise would have expired shortly thereafter, this grand jury that we are concerned with.

A. Mr. Margolis, that is not a lawyer-like statement. You have a question there. I want to object to it on the ground that it assumes something that is not legally correct. Part of your question is factually correct.

Under the present rules of the Federal Court a grand jury continues over automatically for a period of 18 months. Therefore no order of any kind is actually necessary to continue the existence of a grand jury during the 18 months term.

However, out of an abundance of caution, because of the contentions that you and your counsel might make, an order was secured from the Chief Judge of this court for what it [113] was worth continuing the grand jury for the same period of time that the statute provided it was continued for.

Q. As a matter of fact, the grand jury was originally impanelled for a specified term, which period was—that is, at least the order governing provided that it was impanelled for a specified period—and that specified period I think was to expire about February 1st, isn't that so?

(Testimony of James F. Carter.)

A. That is the period of active duty, but under the new rules that became effective in 1946 I believe the grand jury serves for 18 months unless it is sooner discharged by an order of court.

Mr. Margolis: I move to strike everything from "but under the new rules" as argumentative and a question of law, not a question with respect to facts.

Mr. Carter: I object to having it stricken out. Mr. Margolis doesn't seem to know what the new rules provide.

Mr. Margolis: I know them.

The Court: The motion to strike is denied. Let us go on.

Q. (By Mr. Margolis): Now the purpose of the continuance of the grand jury at that time was to carry on this investigation which you have heretofore described and which I read to you your language from the record in this case and no other purpose, isn't that so? [114]

A. That is not exactly correct. In practically every term of the grand jury, even before the new rules, they have been continued with an order of court in order that it might complete matters that were pending.

If I recall right in this particular case there was a general order that the grand jury not be discharged in order to complete matters which were then pending before it. This was one matter that was pending. There may have been others.

(Testimony of James F. Carter.)

Q. Were there other matters pending?

Mr. Goldschein: We object, may it please the court, to this line of examination as having absolutely nothing to do with the issue at hand. As a matter of law the court is cognizant of the matter of law. The grand jury is continuing.

The Court: The last question was, were there other matters pending. Your objection is to that?

Mr. Goldschein: Yes, sir.

The Witness: I will answer that question. I withdraw Mr. Goldschein's objection.

I think there were other matters pending. There generally have been, Mr. Margolis.

Q. (By Mr. Margolis): You know that there were other matters?

A. I could not enumerate them for you.

The Court: As a matter of fact, the general practice in the community is to require service of the grand jury for [115] only six months unless there are matters pending which are not concluded so as to prevent people from having to spend a year or a year and a half away from their business or homes.

Q. (By Mr. Margolis): Let me put it this way: These four witnesses who are here, that is, Healey, Averbuck, Newman and Greenfield, were called to testify before the grand jury only with respect to the investigation which has been entitled here, Investigation by the Grand Jury Concerning Loyalty of Government Employees, and no other matter, isn't that so?      A. That is correct.

(Testimony of James F. Carter.)

Q. Now prior to the time that these witnesses were subpoenaed—three of them subpoenaed and in the case of Mr. Greenfield prior to the time that he was served with a bench warrant—there had been outstanding either subpoenas or bench warrants for some considerable period of time for each of these people, is that so? A. I think so.

Q. For several months, as a matter of fact?

A. I believe so; since shortly after October.

Q. And you have here from time to time in open court referred to something which you called "Operation Get Lost," and I assume by that you meant a number of people who you believed were avoiding service of process or service of bench warrants and therefore were keeping out of the way, so to [116] speak, getting lost, is that right?

A. I referred to the fact that when an attempt was made to serve some 35 subpoenas on October 25 a service was effected on ten of them and it was impossible to effect service on the balance of them. I had no information as to what transpired. Maybe the other 25 went fishing. But at least they weren't around where you could serve subpoenas on them commencing October 25, 1948. I called that "Operation Get Lost."

Q. You believe that these people were seeking to avoid service of process or service of the bench warrants, is that right?

A. I knew that we couldn't serve them.

Q. And you included these four respondents



(Testimony of James F. Carter.)

among the people who you said were in this "Operation Get Lost," isn't that so?

A. I don't know.

Mr. Goldschein: We object, may it please the court. That is immaterial. It has nothing to do with the issue involved.

Mr. Margolis: There have been questions asked about whether these people knew there was a subpoena outstanding against them, and so forth, and I want to show again the danger and the setting. There are questions pending with respect to what I am making a showing, such as when did you [117] first learn there was a subpoena out for you, which were questions which the government has asked be answered. Therefore I have the right to establish the setting with respect to the danger in answering those questions.

The Court: You mean on the ground that they might incriminate themselves under the statute which makes it an offense to obstruct justice?

Mr. Margolis: That is right, your Honor.

Mr. Goldschein: If that is what they are worried about, may it please the court, we will just withdraw that question.

Mr. Margolis: I have asked before, if your Honor will recall, whether the government intended to proceed under all of the questions. I thought maybe they didn't want to proceed with these, but they said every question that wasn't answered.

Mr. Goldschein: We will just withdraw that one.



(Testimony of James F. Carter.)

Mr. Margolis: There are a number of those with respect to the same effect, with respect to several witnesses. If you want to we can take the time to go over them.

The Court: We might do that during recess and refer to the particular questions.

I will stay the order for your commitment, Mr. Margolis, until the conclusion of court today, at which time I will make a further order.

We will have a short recess. [118]

\* \* \*

JAMES M. CARTER

resumed the stand and testified further as follows:

Mr. Margolis: If your Honor please, took a recess in connection with certain questions which the government indicated that it desired to withdraw, and I have hurriedly looked through the record and I think I have all of the questions of that type.

Does your Honor have a copy of the transcript of May 26?

The Court: Yes.

Mr. Margolis: Page 13, line 1, the question:

“Q. All right. Mrs. Healey, when did you first learn that a subpoena had been issued for you?”

Mr. Goldschein: That question is withdrawn, may it [123] please the court.

Mr. Margolis: The next question is line 4 on the same page:

(Testimony of James F. Carter.)

“Q. You knew, did you not, that on October 25 a subpoena had been issued for you?”

Mr. Goldschein: That question is withdrawn.

Mr. Margolis: Then on the same page, line 20:

“Q. Mrs. Healey, I believe the last question was where were you prior to your returning to Los Angeles to business?”

Mr. Goldschein: That question is withdrawn.

Mr. Margolis: If your Honor will turn to page 41, the question beginning at line 25 thereof:

“Q. Mr. Greenfield, when did you first learn that there was a subpoena issued by this grand jury for your attendance here?”

Mr. Goldschein: The same questions will be withdrawn as to all witnesses before the court at this time.

The Court: Line what?

Mr. Margolis: Line 25, page 41.

If it is our understanding that all questions of this character are withdrawn——

The Court: You had better go through them, otherwise there will be some misunderstanding.

Mr. Margolis: The next one is on page 42, line 18: [124]

“Q. Where were you prior to the time that you were arrested?”

Mr. Goldschein: That is withdrawn.

The Court: What page again?

Mr. Margolis: Page 42, lines 18 and 19.

The Court: Very well.

(Testimony of James F. Carter.)

Mr. Margolis: The next one:

“Q. Where were you between October 25, 1948, and May 6, 1949?”

That is on lines 22 and 23 of the same case.

Mr. Goldschein: Withdrawn.

Mr. Margolis: Page 43, your Honor, lines 1 and 2:

“Q. You knew in October that there was a subpoena out for you, did you not?”

The Court: Do you withdraw that question?

Mr. Goldschein: We withdraw the question. What line is that?

Mr. Margolis: Lines 1 and 2 on page 43.

Then on page 49, lines 22 to 24:

“Q. Did you discuss with anybody your being sought as a witness before this grand jury, prior to May 6th?”

The Court: What page is that, counsel?

Mr. Margolis: That is page 49, lines 22 to 24.

The Court: Very well. [125]

Mr. Goldschein: That is withdrawn.

Mr. Margolis: Page 50, lines 3 and 4:

“Q. Where were you from October of 1948 up until May 6th?”

Mr. Goldschein: Withdrawn.

Mr. Margolis: Now, if your Honor please, these are all of the questions of this type that a hurried examination of the transcript indicates. I would like to reserve the right, if I have overlooked any, to raise the matter with respect to other questions later on.

(Testimony of James F. Carter.)

The Court: Very well.

Q. (By Mr. Margolis): Mr. Carter, have you ever identified the defendant, Mrs. Dorothy Healey, as a member or officer of the Communist Party in connection with this investigation?

Mr. Goldschein: We object to that, may it please the court. I don't know what he means by has he ever identified.

The Court: Objection sustained.

Q. (By Mr. Margolis): Have you ever stated in connection with this investigation that the respondent in this case, Mrs. Dorothy Healey, was a member or officer of the Communist Party?

Mr. Goldschein: Object to that, may it please the court, as being immaterial.

Mr. Carter: And on the further ground it is uncertain [126] and indefinite, does not state who, when, where and what.

The Court: It is indefinite. The objection is sustained. It is immaterial unless the statement was before the grand jury, it seems to me, counsel.

Mr. Margolis: I think it makes no difference but I will add a question—I am not withdrawing the prior question.

The Court: The objection is sustained.

Mr. Margolis: If that is indefinite I suppose I will have to start with October 25 and say, did you state on October 25 at any time that Mrs. Dorothy Healey was a member or officer of the Communist Party?

(Testimony of James F. Carter.)

Mr. Goldschein: Does he mean before the grand jury?

The Court: Do you object to it on the ground it is indefinite and uncertain?

Mr. Goldschein: Yes.

The Court: Objection sustained.

Q. (By Mr. Margolis): Did you state on October 26, 1948, before the grand jury that Mrs. Dorothy Healey was a member or officer of the Communist Party?

Mr. Carter: Objected to upon the ground that matters occurring before the grand jury are privileged, and unless the transcript is brought down before this court or otherwise made use of in a legal manner in a courtroom. Therefore I object to answering any matters concerning what went on before the [127] grand jury. Also on the further ground it is immaterial.

Mr. Margolis: This is really a novel theory, that the government having opened up the proceedings can just narrow it down to the part of the proceedings in its favor and not open up to the defendants other parts of the proceedings. It is in accordance with the general approach of the government in this case.

The Court: Just a moment, counsel. The government waived that objection when the court reporters were on the stand. I think if the government insists upon the objection now that they are entitled to it, and it will be sustained on the ground assigned.



(Testimony of James F. Carter.)

Mr. Margolis: I assume that if I were to ask that question with respect to every other date since October 26, 1948, up to the present time that there would be the same objection and the same ruling?

The Court: Are you asking him that question?

Mr. Margolis: Yes. The objection was made that the question was too broad and indefinite because it didn't define a date. I didn't understand the objection, but apparently I am supposed to ask on each date whether he made that statement. I don't want a ruling against me on the ground that I don't specify the date.

The Court: If I understand it now, what your question is to this witness is whether or not at any time before the [128] grand jury in connection with these proceedings he made such a statement.

Mr. Margolis: Yes, your Honor.

Mr. Carter: To which we object upon the same ground—or do you want to answer him, Mr. Goldschein?

Mr. Goldschein: May it please the court, I don't understand the question fully, but let me say this, if the information they are trying to elicit is whether or not the government believes that Dorothy Healey is a member of the Communist Party, then the answer is from me yes, I believe she is. I believe the witness that was on this morning, who testified to her Communist affiliation and connection and the office she held, were true, and that is what we are trying to establish now, and the purpose

(Testimony of James F. Carter.)

we want her to bring those books and records in. That is what they are leading up to. I will admit that.

Mr. Margolis: You will admit that at all times during the time that this inquiry was going on you had information and believed that?

Mr. Goldschein: No, no. I am telling you what we believe now.

The Court: Let us get back to the question.

Mr. Margolis: I refuse to be confined to that now.

The Court: Let us get back to the question. Is there an objection to the question? [129]

The Witness: I understood the question was a question as to what I may have said to the grand jury.

The Court: Whether or not you stated to the grand jury at any time during the course of these investigations that Dorothy Healey was a Communist.

Mr. Goldschein: We are objecting to that, may it please the court, as incompetent, irrelevant and immaterial, and it has nothing to do with the issues.

Mr. Carter: And on the ground also of privilege as heretofore stated.

The Court: Objection sustained.

Q. (By Mr. Margolis): Did you ever state outside of the grand jury to anyone since October 26, 1948 that Dorothy Healey was a member or officer of the Communist Party?

(Testimony of James F. Carter.)

Mr. Goldschein: We object to that statement as being immaterial.

The Court: Sustained.

The Witness: I don't mind answering that though.

The Court: It is immaterial. We have enough latitude in this thing as it is.

Q. (By Mr. Margolis): Did you ever state in the presence of the grand jury that the respondent Averbuck was a member or officer of the Communist Party? [130]

Mr. Carter: Objected to on the ground it is immaterial, and upon the further ground that proceedings before the grand jury are of a confidential nature and within the privilege of the prosecutor not to disclose.

The Court: Objection sustained.

Q. (By Mr. Margolis): Did you ever state outside of the grand jury at any time since October 26, 1948 that the respondent Averbuck was a member or officer of the Communist Party?

Mr. Goldschein: We object to that, may it please the court.

The Court: On the same grounds?

Mr. Goldschein: On the same grounds.

The Court: Same ruling.

Q. (By Mr. Margolis): Did you ever state in the presence of the grand jury that the respondent Greenfield was a member or officer of the Communist Party?

(Testimony of James F. Carter.)

Mr. Carter: Same objection as heretofore made as to the other respondents; on the ground it is immaterial, and upon the further ground that statements by the prosecutor in the presence of the grand jury are privileged.

The Court: Objection sustained.

Q. (By Mr. Margolis): Did you ever state outside of the presence of the [131] *presence of the* grand jury at any time since October 26, 1948 that the respondent Greenfield was a member or officer of the Communist Party?

A. I would like to answer that question unless the court holds it is immaterial. It has been sustained on two other questions.

The Court: If you want to answer it, if you do not object to answering it and if counsel wants an answer, go ahead and answer it.

Mr. Margolis: I certainly don't like this idea of picking and choosing, your Honor. If it is immaterial then it ought to be ruled that it is immaterial.

The Court: That is what I thought, but the witness says he does not object. Do you wish an answer?

Mr. Margolis: I wish an answer to all of the questions.

The Witness: I am not talking now about the question before the grand jury, I am talking about the questions you asked me about Healey, the questions you asked me about Averbuck and Greenfield.

(Testimony of James F. Carter.)

I do not recall that I have stated outside of the presence of the grand jury—referring now only to matters outside of the presence of the grand jury—that any of these people were Communists.

I did state, however, in a talk made before the Lions Club at the Biltmore Hotel that we had certain witnesses up [132] here that I didn't know whether they were Communists or not, but the People's World said that they were members of the Communist Party, and maybe that was correct, if the People's World said so.

Q. (By Mr. Margolis): Is that the substance of what you said?

A. That is the substance of what I said on that subject.

Q. Did you make any statement indicating your belief that they were Communists?

A. No, I don't think I did.

Q. When you spoke before the Lions Club, referring to these proceedings, you said with respect to these proceedings, did you not:

“The proceedings were an education for the grand jury. People are apt to think of Communists as men with long hair and loud raucous voices. As a matter of fact, they look like any American citizen.

“All the men in this case were World War II veterans. You would pass them by in a crowd without suspecting they might belong to a secret conspiratorial organization. Some of them made much about being veterans. But when members of the



(Testimony of James F. Carter.)

jury came to see that they were World War II veterans [133] at a time when Russia was our ally, they felt a little differently about it.

“One of these men told me that he had two small children and would not have been drafted; that he volunteered. I said, ‘So you were patriotic and wanted to defend your country?’

“Then I asked him, ‘If we would have war against Russia tomorrow would you volunteer to fight?’ He wouldn’t answer that question; he wanted to see his lawyer first. His lawyer advised him not to answer it because it was an ‘iffey’ question—a war with Russia was not possible.”

Is it a fact that you made those statements in your speech before the Lions Club?

A. Not exactly. I made some statements which you are apparently reading from some newspaper report that wasn’t taken down verbatim.

I talked before the Lions Club and stated I didn’t know whether these people were Communists or not, that the People’s World said that they were but if they were it was a pretty serious problem for the reason that these men in particular, who had appeared before this court and grand jury, looked like just ordinary Americans, you would pass them in a crowd and not notice them, and that the test generally of whether a person was a Communist or not was whether or not [134] he followed the Communist Party line, that the Communist Party line is a simple thing to determine because you just

(Testimony of James F. Carter.)

ask the question, what is good for the Soviet Union, and when you get the answer to that you have the party line.

For example, I said the Marshall Plan was not good for the Soviet Union; therefore the party line was against the Marshall Plan.

The Atlantic Pact was not good for the Soviet Union; therefore the Communist Party line was against the Atlantic Pact.

And I said that it was rather interesting some of the testimony that had come out concerning Mr. Newman here, who was one of the witnesses. The testimony had been read before this court and was now a matter of public record, that when interrogated before the grand jury he had injected into it the question that he was a World War veteran, a World War II veteran, and didn't have to go, that he had enlisted. So I asked him if he had enlisted in order to serve the United States, and he said, "Yes."

"And to fight for this country because he loved it?" And he said, "Yes."

I said, I asked him the further question, "If war broke out tomorrow with the Soviet Union, would you again enlist?" And he couldn't answer the question. Finally he had to ask to see his lawyer.

I said that might be explained upon the ground that during World War II the Soviet Union was an ally, therefore people who might be members of the Communist Party when they fought for this

(Testimony of James F. Carter.)

country were at the same time fighting for the Soviet Union. But since Russia was no longer an ally, Mr. Newman's answer to that question was very illuminating.

I also said, if you want to know what I said at the Lions Club, that we have a treason law which provides that treason consists of aid and comfort to the enemy, adhering thereto, in time of war. There is no treason law in peacetime. But that if war should break out with the Soviet Union, and God forbid that it should, every member of the Communist Party would be a potential traitor.

Mr. Margolis: All right.

Q. Did you say during that talk that a colossal joke is being played on the American people?

A. Yes, sir, I did. I said that if people were alive in this old world a couple of thousand years from now, and if the Communist Party should succeed in overthrowing the government of the United States by their hiding behind the constitutional guarantees and the Bill of Rights, that those people who lived 2000 years from now would look back and say that that was the most colossal joke ever played upon mankind, that a group of people seeking to destroy the government of the United States, hiding behind the Bill of Rights and the Constitution, [136] were permitted to go ahead and destroy that government because of the government's failure to see what was happening, and it would be the most colossal joke ever played upon mankind from the beginning of time on.

(Testimony of James F. Carter.)

Q. What you are referring to as hiding behind the Bill of Rights was hiding behind the Fifth Amendment to the Constitution, wasn't that right?

A. Hiding behind any constitutional guarantee if the hiding behind that guarantee is done for the purpose of overthrowing the government and if the government should be so overthrown by that activity.

Q. But you are referring particularly to the action in these proceedings with respect to the Fifth Amendment, are you not?

A. I was referring generally to the manner in which Communists claim constitutional rights under a Bill of Rights and a Constitution and at the same time apparently would destroy that very document and the government that it rests upon.

Q. And you were proceeding upon the basis then that the Communist Party of the United States, the Communist Party of Los Angeles, was an illegal conspiracy to overthrow the government of the United States, is that right?

A. I didn't specify either Communist Party of the United States or of Los Angeles County; I just talked about [137] the Communist Party.

Q. And that is what you said about the Communist Party, is that right?

A. That is what I said about the Communist Party, that is right. That is the meeting you missed, Mr. Margolis. Your people cover all my other meetings but they missed that one. That is why you had to rely on a newspaper.



(Testimony of James F. Carter.)

Q. I have heard enough of you in court, Mr. Carter; I don't have to go to any of your meetings.

A. I am referring to some of your clients and supporters.

Q. I haven't any.

You were speaking in the course of this about these particular grand jury proceedings, were you not?

A. Oh, I was talking about—in the course of the talk I mentioned this grand jury proceeding, but that was not the entire discussion. There were many other matters discussed.

Q. But speaking of these proceedings you said, did you not, "The proceedings were an education for the grand jury"?

A. Something to that effect; yes, I did.

Q. You said also, "People are apt to think of Communists as men with long hair and loud raucous voices"; you said that, substantially?

A. I already answered that. I told you all I recalled [138] of what I said.

Q. Did you or did you not also say that?

Mr. Goldschein: I think we have gone into that as far as we ought to. We can't continue with what Mr. Carter said on the outside all night because he said a whole lot of things. Now I don't think they are of such importance to the issues that we ought to drag it out and lengthen the hearing.

The Court: The question is asked and answered.

Mr. Margolis: I have never asked this particular



(Testimony of James F. Carter.)

question as to whether he said these particular specific words.

The Court: Yes, you read the whole thing to him and asked him whether or not he said that, and then he went on and he just got through answering.

Mr. Margolis: He said not in its entirety and now I want to break it down and take each sentence and have him state with respect to each sentence.

He has never answered this specific question, your Honor, and I think I have a right to have the answer to this question.

The Court: The objection is sustained.

Q. (By Mr. Margolis): Did you say, during the course of this speech, "As a matter of fact, they look like any American citizen"?

Mr. Goldschein: May it please the court——

Mr. Carter: That has already been asked and answered. [139]

Mr. Goldschein: The question has been asked and it has been answered. It has been gone over twice.

The Court: Objection sustained.

Q. (By Mr. Margolis): Did you say, during the course of this speech, "All the men in this case were World War II veterans"?

Mr. Goldschein: I object to that, may it please the court, for the same reasons heretofore stated.

The Court: Objection sustained.

Q. (By Mr. Margolis): Did you say during the course of this speech, "You would pass them by

(Testimony of James F. Carter.)

in a crowd without suspecting they might belong to a secret conspiratorial organization''?

Mr. Goldschein: We are objecting to that on all grounds stated, and suggest that we get on into another line of cross-examination. That one has certainly been exhausted.

The Court: Yes. The objection is sustained, counsel. I think if you are reading from the article which you read from first the witness has wholly answered the question.

Mr. Margolis: I would like the record to show, your Honor—do I understand that I must desist from this line of questioning?

The Court: I think it has all been asked and answered. I am asking you, are you reading now from the article which you read from a while ago when you asked the witness a question? [140]

Mr. Margolis: I am reading one sentence at a time. I read it in its entirety before and I am reading one sentence at a time now.

The Court: Then it has been asked and answered.

Mr. Margolis: Does the court order me to desist from asking these questions?

The Court: Yes, I think so.

Mr. Margolis: Then I would like the record to show that but for this order I would ask questions with respect to each individual sentence in this statement which appears in the press, and I would like to know if there is any objection, as far as counsel

(Testimony of James F. Carter.)

is concerned, to this particular article in the newspaper. It appears in the Los Angeles Times, Saturday, May 28, 1949.

Mr. Goldschein: He has read it into the record. I don't think it is necessary.

Mr. Margolis: I want to offer it for another purpose.

The Court: What other purpose?

Mr. Margolis: I want to offer it on the same basis as the other newspaper articles were offered, to show a legitimate basis for fear of self-incrimination on the part of these individuals.

The Court: Admitted in evidence.

Mr. Margolis: I am offering only that portion of this [141] page, consisting of one column, headed, "Attorney Says U. S. Reds Play Joke On People." I am offering no other part of it because no other part of it is material.

The Clerk: First exhibit in this hearing your Honor?

The Court: Yes. This is the first exhibit in this hearing and I think you could date it June 9, Exhibit A.

(The article referred to was marked Respondents' Exhibit A, June 9, 1949 and received in evidence.)

(Testimony of James F. Carter.)

## RESPONDENTS' EXHIBIT A

(Article in Los Angeles Times Part II, page 5, Saturday, May 28, 1949.)

Admitted June 9, 1949.

Attorney Says U. S. Reds Play Joke on People

"Those who follow the party line have one question to test their answer to any situation: 'Is it good for the Soviet Union?' " according to James M. Carter, U. S. attorney here. He told members of the Lions Club meeting at the Biltmore yesterday about the recent Federal grand jury inquiry into Communist activities here.

"A colossal joke is being played on the American people," he said. "Sometime we will look back upon it with amazement. The joke is that a group of people seeking to overthrow the U. S. government are hiding behind the Constitution and Bill of Rights—the very instrument that they seek to destroy."

### 'Education for Jury'

Carter said there was some criticism of the conduct of the investigation before U. S. Judge Peirson M. Hall because the court sessions were held at night. He said that the 23 citizens on the grand jury who were giving their time for small remuneration wished it so as a convenience to them, so that the case could be quickly finished.

"I think that their interest and convenience was more important than that of those whose loyalty was being questioned.

(Testimony of James F. Carter.)

“The proceedings were an education for the grand jury. People are apt to think of Communists as men with long hair and loud raucous voices. As a matter of fact, they look like any American citizen.

‘All Were Veterans’

“All the men in this case were World War II veterans. You would pass them by in a crowd without suspecting they might belong to a secret conspiratorial organization. Some of them made much about being veterans. But when members of the jury came to see that they were World War II veterans at a time when Russia was our ally, they felt a little differently about it.

“One of these men told me that he had two small children and would not have been drafted; that he volunteered. I said, ‘So you were patriotic and wanted to defend your country?’

“Then I asked him, ‘If we would have war against Russia tomorrow would you volunteer to fight?’ He wouldn’t answer that question; he wanted to see his lawyer first. The lawyer advised him not to answer it because it was an ‘iffey’ question—a war with Russia was not possible.”

Mr. Margolis: I would like to offer also a portion of the Los Angeles Daily News for Friday, May 27, 1949, a column headed, “Mrs. Healey Clams Up On Red Activities,” in particular that portion of the newspaper article saying:

“Mrs. Healey—or Connelly—was one of three Communist Party members called before the grand



(Testimony of James F. Carter.)

jury as part of the lengthy investigation into party activities in the county.

“With her were Alvin Averbuck, party organizer for the eastern area of the county, and Elvador Greenfield, harbor organizer for the local Communists.”

And also a portion reading:

“Pretty Mrs. Dorothy Healy, county Communist Party organizing secretary, deadpanned it in Federal Court today while a court reporter read into the record her equally dead-pan refusal to [142] tell the Federal grand jury about Communist activities here.”

I would like to offer that as our exhibit next in order.

Mr. Goldschein: We are objecting to that, may it please the court. I don't think that Mr. Margolis should be permitted to both read them into the record and then place the physical paper in the record.

The Court: It may be marked for identification.

Mr. Margolis: I did the reading indicating the portion of the article that I was offering.

The Court: It will be marked for identification as Exhibit B. It is not admitted in evidence.

(The article referred to was marked Respondents' Exhibit B, June 9, 1949 for identification.)

(Testimony of James F. Carter.)

RESPONDENTS' EXHIBIT B

(Article in Los Angeles Daily News page 10-A Los Angeles Daily News Friday, May 27, 1949.)

Not admitted.

Mrs. Healey Clams up on Red Activities

Pretty Mrs. Dorothy Healey, county Communist Party organizing secretary, deadpanned it in Federal Court today while a court reporter read into the record her equally dead-pan refusal to tell the Federal Grand Jury about Communist activities here.

However, she opened up before Federal Judge Peirson M. Hall long enough to admit coyly that she really is Mrs. Philip Connelly. He formerly was executive secretary of the Los Angeles CIO Council.

Mrs. Healey—or Connelly—was one of three Communist Party members called before the Grand Jury as part of the lengthy investigation into party activities in the county.

With her were Alvin Averbuck, party organizer for the eastern area of the county, and Elvador Greenfield, harbor organizer for the local Communists.

The transcript of testimony given by the trio before the jury was read into public records by E. L. Drummond, reporter.

Among the questions asked of Mrs. Healey, which

(Testimony of James F. Carter.)

she refused to answer on her constitutional rights, were:

“Do you know who is the party organizer? Do you know who has the books and records for the Los Angeles County Communist Party? And who is the educational, labor, membership or social director of the group?”

The other two witnesses were similarly subjected to questions they decided were unanswerable at this time.

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Mr. Margolis: Is that on the ground of lack of foundation, your Honor, that it is a newspaper article, because I will offer evidence to that effect if it is necessary.

The Court: I think I can take judicial notice of the fact that the Daily News is a newspaper of general circulation in this community. To me it lacks foundation in this respect—and I do not think it should be admitted—it relates to proceedings that were in this court when these witnesses were in this court. It is a newspaper report of those proceedings. They had personal knowledge and actual knowledge of what occurred. Therefore they cannot be prejudiced [143] by any statement of a newspaper which reports the proceedings, whether they are right or wrong.

Mr. Margolis: We are not offering them for that purpose.

However, I didn't intend by my question with

(Testimony of James F. Carter.)

respect to foundation to go into that matter. The only point I wished to raise was whether the ruling was based in whole or in part that we had not proved that this was from the newspaper as it appears on its face to be.

The Court: I have indicated the basis of my ruling.

Mr. Margolis: I would like to offer the portions circled in red from the following newspaper articles:

Page 20 of the Los Angeles Evening Herald and Express, Thursday, May 26, 1949. That deals with the same general subject matter.

The Los Angeles Daily News for May 26, 1949.

The Herald-Express for May 27, 1949.

And the Los Angeles Times for May 27, 1949.

The Court: They will be marked for identification.

Is there any objection to their introduction into evidence?

Mr. Goldschein: Yes, sir. I object to them as being immaterial, irrelevant and incompetent, and no bearing on the issues involved here.

The Court: They are incompetent. They will not be admitted in evidence but will be marked for identification. [144]

The Clerk: Exhibits C, D, E and F.

(The articles referred to were marked Respondents' Exhibits C, D, E and F, June 9, 1949 for identification.)

(Testimony of James F. Carter.)

### RESPONDENTS' EXHIBIT C

(Article from Los Angeles Daily News page A-3 Thursday, May 26, 1949.)

Not admitted.

Two men and a woman purportedly holding top drawer jobs in the Communist Party's county organization today went before a secret session of the Federal Grand Jury.

They are Dorothy Ray Healey, described as organizational secretary of the CP in this county, and Alvin Averbuck and Elvador Greenfield, organizers.

### RESPONDENTS' EXHIBIT D

(3 column photo and caption appearing in the Los Angeles Evening Herald & Express page A-20 Thursday, May 26, 1949.)

Not admitted.

#### Long-Missing Red Case Witness Turns Up

Mrs. Dorothy Ray Healey, long sought in the Federal Grand Jury's inquiry into Communist activities here, finally appeared before the jury today. She's shown with Alvin Averbuck, left, and Elvador Greenfield, asserted organizers for the party.

(Article in the Los Angeles Evening Herald & Express page A-2 Thursday, May 26, 1949.)

Not admitted.

L. A. Red Quiz—Dorothy Healey Goes Before  
Grand Jury



(Testimony of James F. Carter.)

Dorothy Ray Healey, organizational secretary of the Communist party in Los Angeles county, today went before the Federal Grand Jury in its inquiry into Southern California Communist activities.

The Federal Grand Jury has been seeking Mrs. Healey for many months for questioning, but she was served with the subpoena only recently.

At the same time Alvin Averbuck, organizer for eastern Los Angeles county of the party, and Elvador Greenfield, harbor organizer, appeared before the federal inquisitorial body in answer to subpoenas.

Mrs. Healey has been the femme fatale of witnesses subpoenaed in the inquiry. Nearly a score of witnesses have been sent to jail by Federal Judge Peirson M. Hall in the case for contempt of court when they refused to obey orders to tell the grand jury whether or not they knew Mrs. Healey.

## RESPONDENTS' EXHIBIT E

(Article in the Los Angeles Evening Herald & Express page A-10 Friday, May 27, 1949.)

Not admitted.

Almost the only bit of information obtained was extracted from Mrs. Dorothy Ray Healey, organizational secretary of the Los Angeles County Communist Party, who disclosed that she is married to Philip M. (Slim) Connelly, former executive secretary of the Los Angeles C. I. O. Council.

(Testimony of James F. Carter.)

### RESPONDENTS' EXHIBIT F

(Article in Los Angeles Times Friday, May 27, 1949, part II page 1.)

Not admitted.

The witnesses were Mrs. Dorothy Ray Healey, organizational secretary of the Communist Party of Los Angeles County; Elvador C. Greenfield, an organizer in the Harbor area for the party, and Alvin Averbuck, organizer for the party in the eastern section of the county.

Mr. Margolis: Is that incompetence based on the fact that your Honor does not consider them to have been proved to be newspapers, because we don't want to fail on that purely technical basis which we can prove?

The Court: I have indicated the basis of my ruling.

Mr. Margolis: I would like then, your Honor, for subpoenas to be issued to these various newspapers so that I can establish at least that these are from the newspapers. Now it appears on their face that they are so I don't see why we can't have a stipulation to that effect.

The Court: I thought I indicated to you, counsel, that I could take judicial notice of the fact that the Daily News is a newspaper. Do you want me to take judicial notice that the Herald-Express is a newspaper?

Mr. Margolis: No, but the point is that these

(Testimony of James F. Carter.)

are articles from those papers. That is the point.

The Court: On or about the date they bear.

Mr. Margolis: That is right.

Mr. Carter: We concede that.

Mr. Margolis: Very well, if that is conceded we are satisfied.

No further questions from Mr. Carter. [145]

The Court: Step down.

(Witness excused.)

Mr. Margolis: I will now ask the court to take judicial notice of two orders. One is the order directing the impaneling and the order impaneling the grand jury here involved. I do not have the minute book reference to that order.

I will also ask the court to take judicial notice of the entry at Volume 68 of the minute book of the Central Division, January 26, 1949, page 221, showing a petition that the grand jury be continued for the reason that said grand jury has begun but not finished divers investigations——

The Court: You have a copy of the minutes there?

Mr. Margolis: I have a partial copy of it, your Honor. It is in pencil. I thought it was a matter of which your Honor could take judicial notice.

The Court: I think I can take judicial notice but if you want me to know what is in it I have to see it.

Mr. Margolis: I copied part of it.

The Court: The Clerk can go in and get it.

Volume 68 of the minutes of the Central Division.

Do you know the reference?

Mr. Margolis: No, but I will be glad to get it for your Honor.

The Court: What about the other impanelment of the grand jury originally? [146]

Mr. Margolis: I don't have the reference but I will be glad to furnish it.

The Court: What is there about this that is material here?

Mr. Margolis: I want to show that it was impanelled for, I think, a 6-months period which expired on or about February 1st.

The Court: If you can find a copy of that I would like to read it. I do not propose to dig through the records and look for it myself.

Mr. Margolis: Your Honor, I shall furnish the citation tomorrow, but I would ask, if I furnish the citation, that your Honor considers that he can take judicial notice of those records.

The Court: I shall take judicial notice of it; surely.

Mr. Margolis: I would like to consult with counsel.

(Conference between counsel.)

Mr. Margolis: Your Honor, I think we are finished. I would like to have the same courtesy that the government had the other day and ask that this matter go over—it is almost 4:00 o'clock—until tomorrow morning, at which time we will be prepared to present anything else that we have.

The Court: If you wish to consult with your

clients, we will have a few moments recess. I think the matter of the objections or the evidence should be concluded today if possible. [147] So we will have a few moments recess while you consult with your clients and come to a conclusion.

(Short recess.)

The Court: Mr. McTernan, if you have no further material this afternoon I will continue the whole matter until tomorrow morning.

Mr. McTernan: We have material which will take about two minutes to present and then we are through.

The Court: Very well. I intend to continue the whole matter until 10:00 o'clock tomorrow anyhow.

Mr. McTernan: If you wish, we can go ahead with this and then continue it.

The Court: I continued the matter relating to Mr. Margolis, and you will have to be here in connection with that matter, and there is a question in my mind whether that is a part of this proceeding or not a part of this proceeding. So you may proceed to conclude with what you have now.

Mr. McTernan: Very well.

We offer, your Honor, an excerpt from the Fourth Report, Un-American Activities in California 1948, Communist Front Organizations, Report of the Joint Fact-Finding Committee to the 1948 Regular California Legislature, Sacramento 1948, published by the Senate of the State of California, and issued by the Fact-Finding Committee on Un-American Activities of the California Senate. [148]



Mr. Carter is willing to waive foundation in so far as identification of the document through Mr. Tenney, or any other person capable of identifying it.

The excerpt which I will read first comes from page 212, runs over to page 214, but I am not going to read it all, just sections within those two pages.

The section begins with a heading "Communist Party" on page 212.

"The Communistic Party keeps its publicly avowed members down to the smallest possible number. The national headquarters of the Communist Party of the United States is located at 35 East 12th Street in New York City.

\* \* \*

"The national chairman of the Communist Party is William Z. Foster, possibly one of the most outspoken traitors the United States has ever tolerated."

Mr. Goldschein: Wait a minute. Are you skipping or what?

Mr. McTernan: I said I was reading portions from it. You will notice one paragraph omitted with reference to the Daily Worker.

Mr. Goldschein: I am sorry.

Mr. McTernan: Continuing: [149]

"The general secretary is Eugene Dennis, alias Waldron. The administrative secretary is John Williamson. The office of treasurer is vacant since the death of Charles Krumbein.

"A national secretariat is composed of William Z. Foster, Eugene Dennis, Robert Thompson, John Williamson, Benjamin J. Davis, Jr., John Gates,

Gil Green, Gus Hall, Irving Potash, Jack Stachel, Carl Winter, and Henry Winston.”

Now skipping to page 213, about a third of the way from the bottom of the page, counsel, beginning with “The California headquarters.”

“The California headquarters is now located at 942 Market Street in San Francisco. William Schneiderman is the California state chairman; Loretta Starvis, organizing secretary; Anita Whitney, state treasurer; Mickey Lima, state field organizer; Celeste Strack, state educational director; Leo Baroway, People’s Daily World circulation director; George Kaye, youth commission chairman; A. Olken, chairman, Jewish commission; Ida Rothstein, state press director; and George Kaye, state youth director.”

Skipping a couple of paragraphs to the paragraph beginning at the bottom: [150]

“Nemmy Sparks is the chairman of the Los Angeles County section. The Los Angeles County section includes the following: Ben Dobbs, labor secretary; Elizabeth Ricardo, press director; Pettis Perry, minorities chairman; Dorothy Healy, organizing secretary; Sidney Burke, editor People’s Daily World; Emil Freed, chairman, Sixteenth Congressional District; Alvin Averbuck, section organizer; Harry Daniels, legislative director; Jim Forrest, harbor section organizer; Merle Brodsky, veterans director; Phil Bock, youth director; and Mort Newman, Carver Club section secretary.”

Reading also, your Honor, from page 383 of that

report, beginning with the heading "Worker's Alliance of America."

"This organization has been discussed at length in previous committee reports.

"Former Attorney General Biddle, in his decision ordering the deportation of Harry Bridges, made the following statement concerning the Worker's Alliance:

" 'The (Communist) Party took control of the Worker's Alliance as a medium through which to organize the unemployed, "to develop widespread militant mass struggles," and "to build the revolution" through association in "a militant class [151] conscious unemployed organization." ' "

Continuing:

"The Worker's Alliance of America was formed through a merger of three larger groups which had been working for some years among the unemployed. These three groups were the Worker's Alliance, National Unemployed League, and the National Unemployment Councils. During its five years of active operation, the Worker's Alliance of America was headed by David Lasser with Herbert Benjamin as national secretary-treasurer. Benjamin has been one of the top leaders of the Communist Party for many years, having served on the party's national committee.

"The National Unemployed Leagues were under the leadership of Arnold Johnson, who had openly supported the Communist Internationale.

"Among those who were affiliated with the Work-

er's Alliance of America are the following: Alexander Noral, Harold Brockway, Oscar Fuss, Charles Baxter, Herman Brown, Carroll Burke, J. M. Cheyney, Paul George, E. C. Greenfield, Charles Howard, Amos Murphy, Mildred Ward, Frankie Duty, Willis Morgan, Brendan Sexton, and Sam Wiseman."

This is our offer from this report. [152]

The Court: The E. C. Greenfield and the Averbuck referred to there are the same Mr. Greenfield that is here and the same Mr. Averbuck?

Mr. McTernan: They bear the same names, your Honor.

Mr. Goldschein: We are objecting to that, may it please the court, as being immaterial, irrelevant, and it has absolutely nothing to do with the matter at bar before this court.

The Court: You have read it in evidence.

Mr. McTernan: We offer it, your Honor, for the same purpose as I set out at some length to your Honor in one of the early cases.

The Court: The objection will be overruled. It is read in evidence and it will be deemed in evidence. I think I am being consistent with my previous ruling in that respect.

Mr. Carter: I take it Mr. McTernan vouches for the material that he offers, which is customary practice for a lawyer.

Mr. McTernan: I make the statement to the court similar to the one I made before. I borrowed the book from Mr. Carter, followed his markings in



it, and I do not vouch for the report, nor the methods by which it was compiled, nor for any of the statements in it. In fact, I condemn the committee as a lawyer, your Honor, and as a citizen I think it is engaged in a highly un-American and highly un-constitutional function very similar, your Honor, to the function on which Mr. Carter [153] has launched the grand jury in this case, in my opinion.

The Court: Counsel's remarks will be stricken from the record as immaterial and impertinent.

Mr. Goldschein: I have another question on this, may it please the court. I notice he mentioned the name of "Dorothy Healy," and I understood him to read it as organizational secretary. Am I correct in that? What page was that you read from?

Mr. McTernan: I read from pages 213 and 214, counsel.

Mr. Goldschein: Yes. At the bottom of page 213, as I see it, Mr. McTernan read, "Dorothy Healy, organizing secretary." I understand he means of the Communist Party here. That is what it says: "Nemmy Sparks is the chairman of the Los Angeles County section."

Now do I understand that by the introduction of this counsel is admitting that Dorothy Healey is organizational secretary of the Communist Party?

Mr. Margolis: Counsel knows better than that. We are offering this evidence for the purpose of showing that the claim is made with respect to each of these defendants, or each of these respondents, that they are in some way connected with the Com-



munist Party and that therefore there is a danger to them. We are not vouching for the truth of any of the statements made in that. It is hearsay for any other purpose except to prove that the danger exists. [154]

The Court: Is the "Dorothy Healy" referred to in the book the same person as the Dorothy Healey that is here?

Mr. Margolis: All we can say, your Honor, is that the name of this "Dorothy Healy" and the name Dorothy Healey who appears here are the same and that this indicates a danger to her.

The Court: If they are not the same person it is wholly immaterial.

Mr. Margolis: We are offering it for the purpose of showing, your Honor, that a person having the same name, and if your Honor will look at the Weisman case I think your Honor will find that this is precisely the type of evidence which was accepted there, that a person having the same name is referred to as an organizational secretary of the Communist Party and that therefore there is a danger to her. It is offered for that limited purpose and for none other.

The Court: Counsel, have you finished there?

Mr. McTernan: May I see the book again?

(The volume referred to was passed to counsel.)

Mr. McTernan: May I point out to your Honor that the "Healy" that is mentioned in this report is spelled H-e-a-l-y, and I understand that

the record here spells the name of Dorothy Healey as H-e-a-l-e-y.

We are offering this material, as Mr. Margolis said, because of the close similarity of the names indicating the [155] risk of prosecutions of these people by virtue of the opinions of the Attorney General and his deputy in this area, Mr. Carter, that the Communist Party advocates the overthrow of the government by force and violence, the thing to which Mr. Carter testified under oath a few minutes ago.

Mr. Carter: It seems to me that counsel has to take a position that either these are the same people or they are not. I don't think an officer of this court can blow hot and cold. I think he should be made to be put on record as to whether it is his contention that these are the same people named. I take it that he does so contend or he wouldn't offer it. But when he gets up to argue he argues the reverse.

The Court: It leaves me as a judicial officer in something of a dilemma. Counsel offers it and says he does not vouch for its accuracy or the truth of the statements and that he did not concede that the people named are the same people. It would seem to me that one or the other should be done.

Mr. McTernan: Your Honor, I would like to try to clarify our position in that if your Honor is confused because I think the record should be clear and we should be given a full opportunity to decide this legally.

If you will recall the Weisman case——

The Court: Yes, I remember. It related to newspaper reports. [156]

Mr. McTernan: The showing simply was that a person who fitted the description of Weisman was a person against whom——

The Court: It was more than a mere name though.

Mr. McTernan: There was no name at all; it was simply a description of him which fitted him.

Mr. Goldschein: Then it couldn't have been anybody else.

The Court: Is there a description of Dorothy Healey in the book?

Mr. McTernan: There is a description by similarity of name which we submit to your Honor is perhaps even closer than the similarity involved in the Weisman case.

Now let me point this out to you, your Honor: Nowhere beginning with *In Re Willie* and coming forward has any court held that in order to claim the privilege the witness must identify himself as the culprit or the potential culprit of the kind of crime for which he fears incrimination. He need only show a reasonable likelihood of danger to himself.

The Court: I understand that, counsel.

Mr. McTernan: And your question, and counsel's questions are directed to asking us to say here in open court that these people are Communists and therefore are subject to the kind of indictment

which Mr. Carter has made abundantly clear this afternoon will follow because it is his opinion as a law-enforcement officer that the Communist Party and its members advocate the overthrow of the government by force and [157] violence.

The Court: If you were offering that document and vouching for its truth and accuracy, then your position would be well taken. But you are not vouching for the truth or accuracy of the document. You say it is just something that has no foundation and you condemn it. Now if you condemn it as the rankest kind of hearsay——

Mr. McTernan: I did not condemn it as the rankest kind of hearsay. I condemned it as the product of a highly unconstitutional adventure on the part of a government agency.

The Court: I misunderstood you then. I thought that either you or Mr. Margolis said that it was.

Mr. McTernan: We admitted that it was hearsay for any purpose other than to show the reasonable likelihood of danger to these people because of the appearance of names identical with or similar to theirs connected with the Communist Party.

Your Honor may recall that we sent through this at great length in the criminal contempt cases involving Kasinowitz, Steinberg and Dobbs.

The Court: Yes, I remember. In any event the matter is read into evidence and you have stated your position, have you?

Mr. McTernan: I think so, your Honor.

The Court: Very well. [158]

Mr. McTernan: At this time we rest.

Mr. Goldschein: The government moves to strike it from the record, your Honor.

The Court: The motion is denied. [159]

\* \* \*

### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 21st day of June, A.D., 1949.

/s/ AGNAR WAHLBERG,  
Official Reporter.

[Endorsed]: Filed July 28, 1948. [161]

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June 10, 1949

\* \* \*

The Court: Before passing on that motion, there were matters which were not concluded yesterday to which Mr. McTernan adverted in his statement. Let me see the minutes, Mr. Clerk.

(The documents referred to were passed to the court.)



The Court: I have here Volume 66, Minute Book of the Central Division, of the records of this court from 8-27-48 to 10-26-48. At page 141 thereof appears the minutes of September 15, 1948, before Judge McCormick, the chief judge, for the impanelment of both the trial and grand jurors, the order for the impanelment of the grand jury appearing at page 143.

Do you wish that read in the record, Mr. McC Ternan?

Mr. Margolis: I asked for it to be read into the record yesterday. I asked your Honor to take judicial notice and I think it should be in the record.

The Court: I will take judicial notice of it and read it into the record now. It is not long.

“Los Angeles, Wednesday, September 15, 1948, McCormick.

“There being now present and found qualified more than 23 veniremen, it is ordered that the names of said veniremen be placed in the jury box, and that the clerk draw therefrom twenty-three (23) names, [167] the persons whose names are so drawn, to constitute the grand jury for the September, 1948, term of this court; and the names of those qualified having been placed in the jury box by the clerk pursuant to court's order, twenty-three names are drawn by the clerk therefrom, said names being as follows:

"Roland B. Ahlswede	"James Maas
"Nordahl F. Arnesen	"Oscar Raspach
"William Badd	"Christine L. Reynolds
"Frances K. Birch	"Adolph C. Schulze
"Robert C. Bruce	"J. William Slater
"Conway R. Burns	"Zeb A. Terry [168]
"Caroline Dapper	"John R. Thompson
"Lawrence E. Fahy	"Dorothy R. Vivian
"Edward H. Fukumoto	"Zita W. Allen
"Charles Jacobs	"Nettie H. Zimmer
"Grace Kater	"Elaine L. Zuercher
"Joseph Kelman	

"And the court having ordered that the veniremen whose names are not drawn from the jury box be excused for the term, to wit:"

And then there follows the list of names other than the 23, which I do not think it will be necessary for me to read.

"The court, at this time, appoints Roland Benjamin Ahlswede as foreman and Nordahl Frederic Arnesen as deputy foreman of the grand jury, and the statutory oath as foreman of the grand jury is thereupon taken by both of the said jurors; whereupon, the other persons so found qualified and drawn, take the same oath which their foremen have taken, and the court thereupon instructs the grand jury, aforesaid, as to their duties as such jurors, and the law relative to proceedings before a grand jury, said grand jury thereupon retire with Ray H. Kinnison, Assistant United States Attorney, to complete their organization by the election of a sec-

retary and to transact any [169] business of the court that may be presented to them.”

That is the end of the minutes on that day.

The other minutes to which you referred were those of January 26, 1949. I think it was volume 68 that you referred to yesterday—I have the page here which I extracted from the book.

Mr. Margolis: It was 68.

The Court: Because the book itself is in use in one of the other courts.

Page 221:

“Los Angeles, Wednesday, January 26, 1949, McCormick, 10:00 a.m.

“Present: Hon. Paul J. McCormick, District Judge;

“In Re Continuing for Service )

“The grand jury impaneled September 1948)

“Court orders that the following order be filed and entered in minutes:

“In the United States District Court, Southern District of California, Central Division

“IN THE MATTER OF CONTINUING FOR  
SERVICE THE GRAND JURY IM-  
PANELED AT THE COMMENCEMENT  
OF THE SEPTEMBER, 1948, TERM OF  
COURT.

“Comes Now James M. Carter, United States Attorney for the Southern District of California, and petitions [170] that the grand jury impaneled by the above entitled court for the term beginning the second Monday in September, 1948, be con-

tinued for the reason that said grand jury has begun but not finished divers investigations of violations of the laws of the United States, the continuance being for the purpose of finishing such investigations and taking such action by indictment or otherwise as may appear to the grand jury to be proper.

“Dated: January 24, 1949.

“JAMES M. CARTER,

“United States Attorney.

“Upon reading and considering the foregoing petition, all resident district judges concurring herein,

“It Is Hereby Ordered that the grand jury impaneled for the September, 1948, term be, and the same is, authorized to continue to sit during the succeeding term of said court beginning on the first Monday of February, 1949, until discharged or until the expiration of eighteen months from and after the date of its impanelment whichever shall first occur, for the purpose of completing investigations commenced but not concluded by said grand jury and to take such action by indictment, or otherwise, as such investigations will warrant. [171]

“Dated: January 26, 1949.

“PAUL J. McCORMICK,

“U. S. District Judge.

“Filed January 26, 1949.

“EDMUND L. SMITH,

“Clerk,

“By THEODORE HOCKE,

“Deputy Clerk.”

You can take those back to the Clerks' office where they may be needed, Mr. Bailiff.

The Bailiff: Yes, your Honor.

The Court: As I understand your motion, Mr. Carter, it is that either in rebuttal or in reopening you desire to reopen the presentation of your matter for the purpose of presenting additional evidence?

Mr. Carter: That is correct, your Honor.

The Court: Before proceeding with the matter of the question asked Mr. Margolis, are you a member of the Communist Party?

Mr. Carter: That is right.

The Court: If I understand your statement correctly, you may wish to withdraw that question in the event of the other evidence being adduced?

Mr. Carter: That is right.

The Court: I think you are entitled to a few moments' adjournment.

Mr. Margolis: I would like to be heard on that matter, [172] your Honor.

The Court: I think this is a matter that is strictly in the court's own discretion and I will just call a recess of a few moments on my own account.

Mr. Margolis: May I be heard after the recess with respect to this matter?

The Court: You may be heard after the recess.

(At this point a recess was taken.)

The Court: Mr. Margolis?

Mr. Margolis: At this point, your Honor, the



respondents rest. There is nothing to rebut in respondents' testimony with respect to whether or not the respondent Healey should be ordered to produce these records. That is, there is nothing with respect to the possession of these records to rebut.

This case has already been reopened once under rather peculiar circumstances. After the government rested and after the defense proceeded with its case, and after I called Mr. Carter to the witness stand, it was reopened because counsel suddenly discovered that they had forgotten to call me to the stand, so they said.

Now counsel asks to reopen the case a second time. I say they have shown no grounds, let alone sufficient grounds, for the reopening of this case. No case should be tried piecemeal. This is not a moving picture in which the hero [173] can come up riding up at the last minute to save the government from losing its case. The government ought to come in like any other litigant into a case prepared to prove its case or not be in court in the first place. And it shouldn't be allowed repeatedly to reopen its case after it has rested in an attempt to buttress a record which is inadequate and which is inadequate because they never had the evidence in the first place.

I oppose any motion to reopen the case, your Honor. I submit that the matter at this point should be submitted unless the government has rebuttal evidence to offer with relation to the mat-

ters which the defense offered in response to the evidence against the respondents, otherwise I submit the matter should stand submitted. We are prepared to argue the matter and to have it decided by the court.

Mr. Carter: If the court please, I do not understand that we are trying any case. Let us find out what the inquiry is about.

The inquiry before this court now is whether certain witnesses should be required to answer certain questions. That is the inquiry. It is not a prosecution for civil or criminal contempt.

Mr. Margolis: Your motion also was that Dorothy Healey be required to produce the books and records.

Mr. Carter: That is right [174]

Mr. Margolis: Which are being sought.

Mr. Carter: Yes.

Mr. Margolis: And that is principally upon what the evidence has been adduced.

Mr. Carter: That is right. In other words, that fits into the same category as the question whether witnesses should be required to answer questions and should a certain witness, in addition to being required to answer questions, be required to produce certain records material to the inquiry which the grand jury is conducting.

Now that is all I have to say on that subject except the motion of the government—if you want to call it reopening—the motion of the government is to put on some further evidence on this matter

which might be considered in the nature of rebuttal in view of the fact that counsel have offered into evidence excerpts from the Tenney Report that indicate she is an officer of the Communist Party. The court will recall they said maybe yes, maybe no, but don't quote me. Counsel said, we don't certify to the accuracy of these reports, we don't vouch for them, and the inquiry was made as to what they were trying to prove, and they said, we think this is hearsay of the worst kind but we still want to offer it.

Now that excerpt read by counsel for these witnesses indicated, if you give any credence to it, that Dorothy [175] Healey was the organizing secretary of the Communist Party of Los Angeles County. It is on this particular matter that the government desires to offer further evidence.

The Court: The inquiry is not a case, it is an inquiry by the court on presentment by the grand jury of these witnesses. I think the government is being treated like any other litigant, and I think in such an inquiry as this that they are entitled, if they have additional evidence, to present it.

In any event they shall be given the opportunity to do so. The objections are overruled.

You will call your witnesses.

Mr. Margolis: We want our objection to be noted to proceeding at this time.

The Court: That is what you just got through doing.

Mr. Carter: Call Mrs. Fisher.

## MRS. CARMEN FISHER

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Mrs. Carmen Fisher.

The Clerk: How do you spell it?

The Witness: F-i-s-h-e-r.

The Clerk: Your address? [176]

The Witness: 1717 West 84th Street.

The Clerk: Los Angeles?

The Witness: Yes.

The Clerk: Take the stand, please.

## Direct Examination

By Mr. Carter:

Q. Mrs. Fisher, you will have to keep your voice up so we can all hear you. A. All right.

Q. You have given your address to the Clerk?

A. Yes.

Q. Have you in the past been an official of the election boards of Los Angeles County?

A. Yes, I have.

Q. For how long a time have you acted in such official capacity? A. Well, since 1946.

Q. What particular position on the election board do you hold?

A. Well, I hold the judge now. I was a clerk.

Q. In the consolidated primary held in Los Angeles on June 1, 1948, what position did you hold? A. Clerk.

(Testimony of Mrs. Carmen Fisher.)

Q. Now, Mrs. Fisher, how many people are on these election boards that meet and conduct the local elections? [177]

A. Well, in the Presidential election there are six.

Q. Let us talk about June 1st.

A. There were six.

Q. And are you supplied with some official documents by the county registrar?

A. Yes, we are.

Q. What are you supplied with?

A. We are supplied with a ledger, with all the names of the registered voters, and also a roster that each voter must sign before he receives a ballot.

Q. Now the register that you are supplied with is a blank book, is it not?      A. That is right.

Q. With a series of lines numbered in sequence from one on?      A. Yes, sir.

Q. And the first voter is required to sign on line No. 1, the second voter on line No. 2, and so on?      A. That is right.

Q. The ledger that you speak of contains the original of the voters' registration, is that right?

A. That is right.

Q. And that is the sheet that is made out at the time a person registers to vote?

A. That is right. [178]

Q. Now when a person presents himself to your polling place to vote, what procedure do you follow?



(Testimony of Mrs. Carmen Fisher.)

A. Well, first they give their name and we look their name up in the ledger.

Q. To see if you have a registration sheet for that voter?

A. A registration sheet for that person.

And they sign the roster and if the name is signed the same as in the ledger we give them a ballot.

Q. Then the person votes and casts his ballot?

A. The person votes and casts his ballot.

Q. When you have finished with the election do you return these records or sheets to the registrar of voters?

A. Yes, we do.

Q. What do you do with the roster of voters for people who sign their names?

A. That is returned also.

Mr. Carter: I ask that the Clerk mark for identification this document entitled "Affidavit of Registration," as government's Exhibit 1.

The Court: We just had one I thought.

Mr. Carter: Better mark it with a date.

The Court: It will be No. 1, June 10.

(The document referred to was marked Government's Exhibit No. 1, June 10, 1949 for identification.) [179]

Mr. Carter: And the roster for identification as No. 2.

The Clerk: June 10, No. 2.

The Court: The registration is No. 1 and the roster is No. 2?

(Testimony of Mrs. Carmen Fisher.)

The Clerk: That is right, your Honor.

(The document referred to was marked Government's Exhibit No. 2, June 10, 1949 for identification.)

Q. (By Mr. Carter): Mrs. Fisher, do you know Dorothy Healey personally?

A. Well, she is my neighbor.

The Court: Do you know her?

The Witness: Yes, I know her.

Q. (By Mr. Carter): Will you point her out to us in the courtroom?

A. She is in the first row the second lady, the first lady next to the man in the first row.

The Court: Well, there is only one lady in the front row.

The Witness: I couldn't see all of them.

The Court: The record will show that the witness has identified the person known as Dorothy Healey in these proceedings.

Q. (By Mr. Carter): How long have you known her?

A. Well, I guess since she moved into the neighborhood [180] I have seen her.

The Court: How long has that been? A year, two years?

The Witness: Well, I would say about three, maybe a little longer.

Q. (By Mr. Carter): I show you an affidavit of registration that has been marked government's

(Testimony of Mrs. Carmen Fisher.)

Exhibit 1 for identification and ask you if you know what that is?

A. That is the pages in the ledger.

Q. That are sent out as part of your ledger?

A. Yes.

Q. I show you a document marked government's Exhibit 2 for identification. Do you know what that is?

A. That is the roster that the voters sign before they receive a ballot.

Q. In your precinct No. 212?

A. In our precinct.

The Court: Whose name is signed to the registration, Exhibit No. 1? What name appears there?

The Witness: What name?

The Court: Yes.

The Witness: Mrs. Dorothy Ray Healey.

The Court: Very well.

Q. (By Mr. Carter): I call your attention to the last page of the roster, [181] Exhibit 2 for identification, and ask you if your name is signed thereto. A. Yes.

Q. Carman Fisher, Clerk? A. Yes.

Q. Did you have charge of this roster on the date of June 1, 1948?

A. I didn't have charge of it; the judge has charge of it. I was the clerk handling the ballots at that time.

Q. Sitting there alongside of the judge?

A. Yes.

(Testimony of Mrs. Carmen Fisher.)

Q. On June 1, 1948, did Dorothy Healey present herself to your precinct to vote?

A. Yes, she did.

Q. What happened at that time?

A. Well, she came in the same as any other voter and the judge looked her name up and she signed her name, and I handed her the ballot; she voted and walked out.

Q. Did you see her sign her name?

A. I was across the table when she sat down to sign her name.

The Court: Did you see her sign?

The Witness: Yes, I did.

Q. (By Mr. Carter): Calling your attention to item No. 108, where the [182] name Mrs. Dorothy Ray Healey, 1733½ West 84th Street, appears. Is that the signature you saw her sign?

A. Yes, it is.

Mr. Carter: At this time we offer in evidence government's Exhibit 1 for identification and government's Exhibit 2 for identification, subject to the right to make photostats thereof so that the originals may be returned to the registrar of voters.

Mr. Margolis: Objected to on the ground it is incompetent, irrelevant and immaterial, no relation to any issue in this case.

Mr. Carter: I propose to make photostats of the first and last page of the roster and only the page in which item 108 appears; also a photostat of the registration slip.

(Testimony of Mrs. Carmen Fisher.)

Mr. Margolis: It has no materiality in this case at all, your Honor.

Mr. Carter: It is foundational, your Honor. We have something further.

The Court: I take it it is preliminary. It will be marked for identification and when its materiality becomes apparent I will rule on the question of its admissibility.

Mr. Carter: You may cross-examine.

Mr. Margolis: No questions.

The Court: You may be excused.

(Witness excused.) [183]

The Court: Next witness.

Mr. Carter: May I ask the witness to remain for a short time?

The Court: Very well. You will remain in attendance until you are excused by the court.

Mr. Goldschein: Mr. Jenkins, please.

### LAWRENCE H. JENKINS

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Lawrence H. Jenkins.

The Clerk: L-a-w-r-e-n-c-e?

The Witness: Yes.

The Clerk: Your address?

The Witness: 775 Oak Street, Laguna Beach.

The Clerk: Take the stand, will you, please?



(Testimony of Lawrence H. Jenkins.)

Direct Examination

By Mr. Goldschein:

Q. Your name is L. A. Jenkins, is it not?

A. L. H.

Q. L. H. Jenkins? A. That is correct.

Q. What is your business, Mr. Jenkins?

A. Assistant cashier of the Security-First National Bank. [184]

Q. Tell us whether or not you have charge of the records of that bank.

A. I have charge of the records in the banking department at the head office of the bank.

Q. Do you have an account at the bank of the Los Angeles County, Communist Party, Tax Account?

A. That I cannot disclose at the present time. We did have such an account.

Q. Was there such an account in your bank?

A. There was such an account; yes.

Q. Was there a signature card on that account filed with your bank on August 14, 1947?

A. There was.

Q. Now will you tell us what the signature card requirement is? What is a signature card at your bank?

The Court: Do you have it?

Mr. Goldschein: Yes, he has it.

The Court: Let us mark it for identification.

Mr. Goldschein: Government's Exhibit No. 3.

The Court: Exhibit No. 3, June 10th.

(The document referred to was marked Gov-

(Testimony of Lawrence H. Jenkins.)

ernment's Exhibit No. 3, June 10, 1949 for identification.)

Mr. Goldschein: Do you care to see it?

Mr. Margolis: Yes. [185]

(Exhibiting to counsel.)

Q. (By Mr. Goldschein): Mr. Jenkins, did the Los Angeles County Committee Communist Party have an account at your bank?

A. They have an account there at the present time.

Q. Do you have a signature card for them dated January 30, 1948? A. Yes, sir.

Q. Do you have one for the same account dated March 7, 1947? A. That is correct.

Q. Do you have another of that account dated April 12, 1946? A. That is right.

Q. Do you have another on that account dated October 26, 1945?

A. Yes. That was the date on which the account was originally opened on October 26, '45.

Mr. Goldschein: I would like to mark them as government's exhibits.

The Court: That will be Nos. 4, 5, 6 and 7, June 10th. In that order, '48, '47, '46 and '45.

(The signature cards referred to were marked Government's Exhibits Nos. 4, 5, 6 and 7, June 10, 1949 for identification.) [186]

Q. (By Mr. Goldschein): Mr. Jenkins, can you tell us what the signature cards in your bank are used for?

(Testimony of Lawrence H. Jenkins.)

A. They are used as the authority for the payment of checks drawn against the account.

Q. And the signature card is what? Who is it made by?

A. It is made by the depositor. In the case of an organization, an association, or a corporation it would have a resolution on the back there signed by the authorized officials of the association or corporation, whichever it might be, authorizing the signatures that appear on the face of the card.

Q. And it is used for what, comparison for the payment of checks?

A. Comparison for the payment of checks.

Q. Comparison of signatures on the checks?

A. The signatures on the checks; that is right.

Q. Now are these records made in the usual course of business and required to be kept in the usual course of business?

A. That is right; yes.

Mr. Goldschein: We offer in evidence, may it please the court, government's Exhibits 3, 4, 5, 6 and 7 for identification.

Mr. Margolis: I would like to ask some questions on voir [187] dire, your Honor.

The Court: Let me see them.

(The exhibits referred to were passed to the court.)

The Court: You may do so. Proceed.

#### Voir Dire Examination

By Mr. Margolis:

Q. With respect to the accounts for which these

(Testimony of Lawrence H. Jenkins.)

various cards that have been marked in identification apply, do you know when each of those accounts was last used?

A. I couldn't recall offhand. I can tell on the tax account. It shows the date it was closed.

That account was closed on January 18, 1949.

Q. Do you know whether or not Mrs. Healey had anything to do with the closing of that account?

A. I couldn't say on that; no.

Q. Do you know when Mrs.——

Mr. Carter: What number was that?

The Court: No. 3.

Q. (By Mr. Margolis): Do you know when Mrs. Healey had anything to do with any one of those accounts, or the person whose name appears on there as Mrs. Healey, that person, had anything to do with any one of those accounts beyond the date which each of those cards bears?

A. No, I do not. [188]

Mr. Margolis: I object to the cards, if your Honor please, on the grounds that they are incompetent, irrelevant and immaterial, remote, do not establish anything with respect to the present condition.

Mr. Carter: We have one other witness who will compare the signatures on the cards.

The Court: They will be marked for identification.

Have you finished with this witness?

Mr. Goldscheim: Yes, sir.

The Court: Did you bring the blanket ledger along to show the last account?

(Testimony of Lawrence H. Jenkins.)

The Witness: I did not.

The Court: Does your bank make microphotographs of the checks as they go through the accounts?

The Witness: We do not.

The Court: You do not?

The Witness: No.

The Court: Very well. You may be excused.

(Witness excused.)

Mr. Margolis: We ask that Mr. Jenkins be asked to remain a few minutes.

The Court: Very well. You will remain here until excused by the court.

Mr. Carter: May photostatic copies of those cards be substituted so that the original records may be returned to [189] bank?

The Court: Sooner or later. You can leave them here, but not now.

Next witness.

Mr. Goldschein: Mr. Donn E. Mire.

### DONN E. MIRE

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Donn, D-o-n-n, E. Mire, M-i-r-e.

The Clerk: Your address, Mr. Mire?

A. Home address?



(Testimony of Donn E. Mire.)

The Clerk: Yes.

The Witness: 811 West Century Boulevard.

The Clerk: Los Angeles?

The Witness: Los Angeles 44.

The Clerk: Take the stand.

### Direct Examination

By Mr. Goldschein:

Q. What is your name, please, sir?

A. Donn E. Mire.

Q. Where do you live?

A. I live at 811 West Century Boulevard, Los Angeles, California. [190]

Q. What is your business?

A. I am a police officer.

Q. Any particular specialty? A. I have.

Q. What is it, sir.

A. I am attached to the scientific investigation bureau as a handwriting expert.

Q. How long have you been in that business?

A. The past ten years.

Q. Did you have any preliminary education in that business before you started it? A. I did.

Q. Will you tell what you had in the way of education along those lines?

A. At first I took a course from Mr. John L. Harris, who was a teacher at the University of Southern California Extension Course, which lasted approximately 12 weeks.

I also studied under my superior officer at that time, who was Lou L. Davis.

(Testimony of Donn E. Mire.)

I also have studied several books, the main one which is Albert S. Osborne on "Questioned Documents."

I have worked with other outside handwriting men, such as Mr. Harris, and Mr. J. Clark Sellers, and have made many examinations and comparisons of questioned documents, and have testified in different courts in this county and other [191] counties and other states, I would say approximately 1500 times, as to my findings.

Q. Now, Mr. Mire, will you look at government's Exhibit No. 1 and tell us whether or not you have seen that document before?

A. Yes, sir, I have.

Q. Did you examine the signature there of Mrs. Dorothy Healey?           A. I did.

Q. Did you examine government's Exhibit No. 2?           A. I did.

Q. Did you examine the signature of Mrs. Dorothy Healey opposite No. 108 on that exhibit?

A. Yes, sir, I did.

Q. Did you examine government's Exhibits Nos. 3, 4, 5, 6 and 7?           A. Yes, sir.

Q. Did you examine the signature of Mrs. Dorothy Healey on Exhibits 3, 4, 5, 6 and 7?

A. I did.

Q. Now can you tell us from your experience whether or not the signatures on No. 1 and 2 were made by the same person as government's Exhibits 3, 4, 5, 6 and 7?

(Testimony of Donn E. Mire.)

The Court: You mean the signature of Dorothy Ray Healey?

Mr. Goldschein: The signature of Dorothy Ray Healey. [192]

The Witness: Yes, sir. From my examination it is my opinion that the name of Mrs. Dorothy Ray Healey on government's Exhibits 1 and 2 was written by the same person who wrote the signature Dorothy Ray Healey on government's Exhibits 3, 4, 5, 6 and 7.

Mr. Goldschein: We offer in evidence, may it please the court, the exhibits previously marked for identification.

Mr. Carter: No. 1 to 7 inclusive.

Mr. Goldschein: No. 1 to 7 inclusive. We offer them all in evidence.

The Court: Admitted.

Mr. Margolis: We weren't given an opportunity to state our objections.

The Court: Very well.

Mr. Margolis: I assume your Honor has considered our prior objections as having been repeated when this offer is repeated?

The Court: Yes.

Mr. Margolis: Very well.

(The documents referred to were marked Government's Exhibits Nos. 1 to 7 inclusive, June 10, 1949 and received in evidence.)

(Testimony of Donn E. Mire.)

GOVERNMENT'S EXHIBIT No. 1

AFFIDAVIT OF REGISTRATION

(Original)

I last registered at and removed from No. 1933 West 6th Street, L.A., 237 Precinct. I hereby authorize the cancellation of said registration.

Los Angeles City Precinct No. 212.

State of California,  
County of Los Angeles—ss.

The undersigned affiant, being duly sworn, says: I will be at least twenty-one years of age at the time of the next succeeding election, a citizen of the United States ninety days prior thereto, and a resident of the State one year, of the County ninety days, and of the Precinct forty days next preceding such election, and will be an elector of this County at the next succeeding election.

1. I have not registered from any other precinct in the State since January 1, 1936.

2. My full name is Mrs. Dorothy Ray Healey.

3. My residence is 1733 West 84th Street, North Side, between Western and Harvard Streets. Post office address at 1733 West 84th St.

4. My occupation is housewife.

5. My height is 5 feet, .. inches.

6. I was born in Colorado.

7. I acquired citizenship by .....

(Testimony of Donn E. Mire.)

9. I intend to affiliate at the ensuing primary election with the declines to state Party.

/s/ MRS. DOROTHY RAY HEALEY,  
1733 W. 84th St.

Subscribed and sworn to before me this 21st day of August, 1946.

M. J. DONOGHUE,

Registrar of Voters,

By /s/ THOMAS J. CARROLL,

Deputy Registrar of Voters.

E 384400

Admitted June 10, 1949.

## GOVERNMENT'S EXHIBIT No. 2

### ROSTER OF VOTERS

of the

Consolidated Primary Election

Held in Los Angeles, Precinct No. 212, in Los Angeles County, California, June 1, 1948.

Signature in Roster must be compared with Signature in Precinct Register. Insert this Roster in Envelope No. 4.



# Roster of Voters

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# Roster of Voters

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[Stamp]: Requires any two signatures.

Los Angeles County Committee

Communist Party Tax Account

Sign Here

/s/ N. SPARKS

/s/ DOROTHY RAY HEALEY

/s/ BARBARA MORLEY

Address 124 W. 6th St. Telephone TR. 7913.

Former bank account or reference Regular Acct.

First deposit \$32.60.

Acct. opened by [Illegible].

Date Aug. 14 '47.

[Reverse side of card.]

Security-First National Bank of Los Angeles:

Date 8-7-47

At a meeting of Los Angeles County Committee, of the Communist Party, Tax Account held on July 19, 1947, N. Sparks and/or Dorothy Ray Healey, Barbara Morley whose signatures are given on the reverse side of this card, were authorized, any two acting together, to execute checks and other items for and on behalf of this Committee and each of them was authorized to indorse checks and other items payable to this Committee for deposit.

Further that this Committee agrees to the conditions printed in the Bank Book issued in connection with its account with the Security-First National Bank of Los Angeles, as to all deposits and withdrawals made on said account and to other transac-

(Testimony of Donn E. Mire.)

tions with said Bank.

/s/ N. SPARKS,  
President.

/s/ DOROTHY RAY HEALEY,  
Secretary.

[Stamp]: Account Closed Jan 18 1949

Admitted June 10, 1949.

GOVERNMENT'S EXHIBIT No. 4

COMMERCIAL

[Stamp]: Sixth & Spring Office

[Stamp]: Requires two signatures.

Los Angeles County Committee Communist Party  
Sign Here

/s/ N. SPARKS

/s/ DOROTHY RAY HEALEY

/s/ BESS LUEB

Address 124 West 6th St. 14 Telephone TR 7913

Former bank account or reference Supersedes

Previous Card Dated 3-7-'47.

[In Pen]: (10-26-45)

Date Jan 30 '48

[Reverse side of card.]

Security-First National Bank of Los Angeles:

Date Jan. 30, 1948

At a meeting of Los Angeles County Committee  
of the Communist Party held on January 21, 1948  
and/or N. S. Sparks, Dorothy Ray Healey, Bess  
Lueb whose signatures are given on the reverse side

(Testimony of Donn E. Mire.)

of this card, were authorized, Any two acting together, to execute checks and other items for and on behalf of this organization and each of them was authorized to indorse checks and other items payable to this organization for deposit.

Further that this organization agrees to the conditions printed in the Bank Book issued in connection with its account with the Security-First National Bank of Los Angeles, as to all deposits and withdrawals made on said account and to other transactions with said Bank.

/s/ N. SPARKS,

Chairman,

/s/ DOROTHY RAY HEALEY

Secretary.

Above Authorization Verified

/s/ BARBARA MORLEY

Former Secretary

Admitted June 10, 1949.

GOVERNMENT'S EXHIBIT No. 5

COMMERCIAL

[Stamp]: Sixth & Spring Office

[Stamp]: Requires any two signatures

[Stamp]: Revoked Date Jan 30 '49 See New  
Card in Live File



(Testimony of Donn E. Mire.)

Los Angeles County Committee Communist Party  
Sign Here

/s/ N. SPARKS

/s/ DOROTHY RAY HEALEY

/s/ BARBARA MORLEY

Address 124 W. 6 Street Telephone TR 7913

Former bank account or reference Supersedes  
Previous Card Dated 4-12-46

(10-26-45)

Date Mar 7-'47

[Reverse side of card.]

Security-First National Bank of Los Angeles:

Date.....

At a meeting of Los Angeles County Committee of the Communist Party held on Feb. 20, 1947, Barbara Morley and/or N. Sparks, Dorothy Ray Healey whose signatures are given on the reverse side of this card, were authorized, any two acting together to execute checks and other items for and on behalf of this political party and each of them was authorized to indorse checks and other items payable to this political party for deposit.

Further that this political party agrees to the conditions printed in the Bank Book issued in connection with its account with the Security-First National Bank of Los Angeles, as to all deposits and withdrawals made on said account and to other transactions with said Bank.

/s/ N. SPARKS

President.

/s/ DOROTHY RAY HEALEY

Secretary.

Admitted June 10, 1949.



(Testimony of Donn E. Mire.)

GOVERNMENT'S EXHIBIT NO. 6

COMMERCIAL

[Stamp]: Sixth & Spring Office

[Stamp]: Requires any two signatures

[Stamp]: Revoked Date Mar 7 '47 See New  
Card in Live File

Los Angeles County Committee Communist Party  
Sign Here

/s/ DOROTHY RAY HEALEY

/s/ ELIZABETH GLENN

/s/ N. SPARKS

Address 124 W. 6th St. Telephone TR. 7913

Former Bank Account or Reference Supersedes  
Previous Card Dated 10-26-45

(10-26-45)

Date Apr 12 '46

[Reverse side of card.]

Security-First National Bank of Los Angeles:

Date April 8, 1946

At a meeting of Los Angeles County Committee of the Communist Party held on April 4, 1946, Dorothy Ray Healey and/or Elizabeth Glenn, N. Sparks whose signatures are given on the reverse side of this card, were authorized, any two acting together to execute checks and other items for and on behalf of this Committee and each of them was authorized to indorse checks and other items payable to this Committee for deposit.

Further that this Committee agrees to the conditions printed in the Bank Book issued in connection with its account with the Security-First National

(Testimony of Donn E. Mire.)

Bank of Los Angeles, as to all deposits and withdrawals made on said account and to other transactions with said Bank.

/s/ N. SPARKS,  
President.

/s/ DOROTHY RAY HEALEY,  
Secretary.

Admitted June 10, 1949.

GOVERNMENT'S EXHIBIT NO. 7

COMMERCIAL

[Stamp]: Requires any two signatures

[Stamp]: Revoked Date Apr 12 '46 See New  
Card in Live File

Los Angeles County Committee Communist Party  
Sign Here

/s/ DOROTHY RAY HEALEY  
/s/ N. SPARKS  
/s/ BEATRICE BARON

Address 124 W. 6th St. Telephone TR. 7913  
Coml. L.A. County Com. Communist Political Asso.  
Closed To This

Former Bank Account or Reference: Security-First  
National Bank of Los Angeles

First Deposit \$1316.76 Acct. Opened By RH  
Date Oct 26, '45

[Reverse side of card]

Security-First National Bank of Los Angeles:

Date 10-26-45

At a meeting of Los Angeles County Board of the

(Testimony of Donn E. Mire.)

Los Angeles Communist Party held on October 24, 1945, Dorothy Healey and/or Nemmy Sparks and Beatrice Baron whose signatures are given on the reverse side of this card were authorized, any two acting together to execute checks and other items for and on behalf of this Communist Party and each of them was authorized to indorse checks and other items payable to this organization for deposit.

Further that this.....agrees to the conditions printed in the Bank Book issued in connection with its account with the Security-First National Bank of Los Angeles, as to all deposits and withdrawals made on said account and to other transactions with said Bank.

/s/ N. SPARKS,

Chairman.

/s/ DOROTHY RAY HEALEY,

Secretary.

Oct 26 '45

To Bank of America, 7th and Spring

Gentlemen:

The person whose specimen signature is shown below has given you as reference. Please verify the signature and supply the information requested on the reverse hereon, which will be treated confidentially and is without liability on your part. Please reply on this form, using stamped envelope inclosed

(Testimony of Donn E. Mire.)

Specimen Signature

/s/ BEATRICE BARON

L. A. Committee Communist Party

Refers To:

[x] Open Commercial Account

[x] Open Savings Account

[Reverse side of card.]

### REPLY

Signature compares favorably with our specimen.

Kind of Account: Coml

Date Opened: 4-2-45

Check [x] Average Balance Below:

Under \$100 [ ]

\$100 to \$500 [ ]

\$500 to \$1000 [ ]

\$1000 to \$5000 [x]

Over \$5000 [ ]

Addressee Please Sign Here

/s/ [ILLEGIBLE]

Authorized Signature.

Admitted June 10, 1949.

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Mr. Goldschein: That is all.

The Court: Cross-examine.

Mr. Margolis: No questions. [193]

The Court: You may be excused.

(Witness excused.)

The Court: Next witness.

Mr. Carter: That is all, your Honor.

The Court: Very well.

Mr. Margolis: At this time, your Honor, I have a motion to make.

The Court: They said "that is all," but there is another thing unfinished in connection with the presentation of this matter, and that is the matter of the question which was asked Mr. Margolis yesterday, which is a part of this inquiry.

Mr. Margolis: However, your Honor, may I make a motion with respect to this last testimony?

The Court: Very well. I thought you had a general motion to make.

Mr. Margolis: No. I move to strike all of the testimony of the last three witnesses on the grounds that it was improper to reopen these proceedings and to try this case in the piecemeal manner in which it has been tried, that a proceeding of this character, like any other proceeding, is one in which the orderly processes of law must be followed and not one in which the government may come into a court without having evidence, get continuances from time to time for the purpose of preparing this bit of evidence and that bit of [194] evidence, interrupting the case in the middle to get an idea to call some additional witness. I say that this kind of a procedure, your Honor, constitutes a denial of due process of law.

On these grounds I move to strike all the evidence of the last three witnesses.

The Court: The motion is denied. [195]

\* \* \*

And another respect in which this is a sham pro-



(Testimony of Donn E. Mire.)

ceeding, your Honor, these counsel representing the United States government have said that there is no claim of privilege against self-incrimination in connection with answers which might connect a witness with the Communist Party. But their counterpart, another special assistant to the Attorney General, a man named Donohue, who is conducting another investigation of this kind in San Francisco, before a grand jury asks witnesses before the grand jury questions connecting them with the Communist [209] Party and they claim their privilege, and that counsel for the government concedes that the claim of privilege is good and dismisses the witness, and everybody who has been subpoenaed along with him, because he recognizes this to be a valid claim and a privilege.

I offer this affidavit in order to show your Honor what happened before the grand jury there.

The Court: Are you offering this in evidence?

Mr. McTernan: Yes, I am.

The Court: Do you wish to reopen your case for the purpose of offering this in evidence?

Mr. McTernan: I am offering this affidavit in support of the motion to dismiss and on the basis of the affidavit I ask for a subpoena to be directed to F. Joseph Donohue—I believe his name is—Special Assistant to the Attorney General of the United States, that he be summoned here to testify concerning the facts set forth in this affidavit to show your Honor what a two-faced policy the government follows.

We told you about the two-faced policy between Los Angeles and New York; now it is happening in the same state in adjacent districts. Here they say there is no claim of privilege based upon membership in the Communist Party under the Smith Act, and in San Francisco before another grand jury they say it is, and they dismiss the witness and they don't even start these proceedings. [210]

\* \* \*

Mr. Goldschein: May it please the court, so much has been said here about the intent and purpose and vilification of the Department, the Attorney General in this matter, that I think it necessary also for the purposes of the record to explain our position so that there won't be any question on it in the record.

I would like to begin with my entry into this type of case. I want the court to know, and the record to show, that about September of last year I was called into the office, shown some files, and asked whether I would like to handle that case.

The Court: Counsel, I do not think the situation calls for any explanation of your personal relationship in connection with this matter. The matter is entitled, Investigation by the Grand Jury Concerning Loyalty of Government Employees, Miscellaneous Investigation No. 279, 18 U.S. Code 1001, 18 U.S. Code 80 (Old Section).'' [212]

This has been the argument advanced by Mr. McCarnan, and it has been repeatedly advanced in this court and has been overruled.

Mr. Goldschein: If the court will just give me

a few minutes I would like the record to show that these things that Mr. Margolis and Mr. McTernan are talking about—I won't take any more time than Mr. McTernan has taken; as a matter of fact, I will take less time—and I will cut out the preliminaries, how I got into this type of case, but merely show the importance of it, if the court will permit me, by illustrating what took place in another district on this type of matter only to show why the government is going into this type of investigation and why the grand jury is so insistent upon having the books and records. May I?

The Court: Go ahead.

Mr. Goldscheim: In September of last year I went to another judicial district on a simple matter of a Federal employee making a false statement to an agency of the Federal government, and on its face it appeared that there was nothing very much aggravated about it. In order to determine whether or not the man should or should not be prosecuted, we determined to look in and see his purpose in making the false statement.

The employee was an aircraft mechanic, working at the Lowry Field air base, an Army air base, in Colorado, repairing [213] Army airplanes, and had gone underground and hid his Communist activity and made a false statement with reference to it.

On inquiry it developed that this same Federal employee, this aircraft mechanic, was driving a truck on this air base, a truck on which he had no business driving, driving it in an area of the field where he had no business being, and backed that

truck into a communications panel of the Lowry Air Field and knocked the whole communication system out of whack, and it was out for two or three hours.

It appeared from that that there was something more sinister behind the denial of this employee of his affiliations and activities.

There were some other cases in that same area of a similar nature, that is, government employees who we had some information to indicate that they were connected with organizations listed by the Attorney General as being subversive, who had made statements to a Federal government, denying any participation or connection with such activities.

It then became necessary there, as it did here, to determine from the books and records of the Communist Party whether or not these Federal employees were actually members of that party.

Now according to all the books and records that I have read, law books, the procedure is a very simple one. The witness is called before the grand jury, he is asked the pertinent [214] questions, if he claims the privilege he is brought before the court and then the court determines whether or not the question is privileged and orders the witness to answer or not to answer as the case may be.

\* \* \*

The Court: Very well.

There has been no request that any of these respondents make a statement to the court in chambers on their part. It is [219] up to them if they want to do that, it is not up to me.



Mr. Goldschein: I assume the court will hear them if they make the request.

The Court: I will give it consideration. [220]

\* \* \*

The Court: By the way, the record will show that Mrs. Healey, Mr. Newman, Mr. Greenfield and Mr. Averbuck have been present since the proceedings began this morning, in person and by counsel.

The matter presented by counsel in objection generally has not differed from the arguments heretofore advanced. I read the Rosen case and I can see a considerable distinction there between the situation as it related to Rosen and as it is presently postured concerning these witnesses and the questions upon which I am about to rule.

I think all of the questions asked, as I will indicate them, are material and I do not think that the answering of any of them will incriminate or tend to incriminate any of the defendants.

Taking up first Horace Morton Newman, Jr. He appeared before the grand jury the first time I think on April 21 and then again on May 26. Most of the questions concerning Dorothy Healey asked of Mr. Newman at that time would now seem to me [294] to be immaterial, "Do you know where she lives," for instance, and "Do you know her husband's name" and "Do you know where she can be found or located" and "Have you seen Dorothy Healey recently."

However, I do think it is material for the witness to answer the questions "Do you know Dorothy Healey," "Do you know her office address" and



“Do you know her business or occupation,” because it must be remembered that one of the things which the grand jury is seeking here are the records which will enable the grand jury to determine whether or not the persons under investigation were or were not members of the Communist Party.

For that reason I will overrule the objections which have been made and now order the witness Horace Morton Newman, Jr., to be and appear before the grand jury—what date will they be in session again?

Mr. Carter: I suggest Tuesday this following week.

The Court: June 14?

Mr. Carter: June 14.

The Court: At 9:30?

Mr. Carter: 9:30.

The Court: That Horace Morton Newman, Jr., be and appear before the grand jury of this district, before whom he heretofore appeared, at their office in this building on Tuesday, January 14th, at 9:30 o'clock in the morning, and [295] then and there give answer to the following questions. And that order will be a separate order as to each question, that is to say, he is ordered to answer the question: “Q. Do you know Dorothy Healey?”

He is ordered to answer the question: “Q. Do you know her office address?”

He is ordered to answer the question: “Q. Do you know her business or occupation?”

He is ordered to answer the question: “Q. Now, what is your business address?”

He is ordered to answer the question: "Q. Who are you educational director for?"

Mr. Margolis: Is your Honor reading from the record? I was wondering if I could find it.

The Court: Yes.

Mr. Margolis: I want to follow it.

The Court: Page 71, lines 18 and 19. I have read that one.

On line 23, I read that one.

Page 72, line 4 now.

Mr. Margolis: Thank you.

The Court: He is ordered to answer the question: "Q. Do you know who the financial director is of the eastern division of the Los Angeles County Communist Party?"

The same order as to this question: "Q. Do you know who [296] the membership or social director is of the eastern division of the Los Angeles County Communist Party?"

The same order as to this question: "Q. Now who is the chairman of the Los Angeles County Communist Party?"

The same order as to the question: "Q. Who is the organization secretary of the Los Angeles County Communist Party?"

Page 73, line 8, the same order as to the question: "Q. Now do you know whether or not the Los Angeles County Communist Party has a labor director?"

The same order as to the following question: "Q. Do you know whether or not they have a membership or social director?"

The same order as to this question: "Q. Do you know whether or not the membership or social director has a list of the membership of the Los Angeles County Communist Party?"

The same order: "Q. Do you know whether or not the Los Angeles County Communist Party has a financial director?"

The same order: "Q. Do you know whether or not the financial director keeps an account of the dues collected from the members of the Los Angeles County Communist Party?"

Page 76, line 15, the same order: "Q. Do you report to anybody whom you see?"

Page 78, line 1, the same order: "Q. Do you know Dorothy Healey as the organizational secretary of the Communist Party of Los Angeles County?" [297]

The same order: "Q. Do you know whether Dorothy Healey has in her possession or under her control any books and records of the Communist Party of Los Angeles County?"

Mr. Newman, do you understand the order?

The Witness Newman: Yes.

The Court: Very well.

As to the witness Alvin Abram Averbuck—which one is that?

The Witness Averbuck: Here.

The Court: You are Mr. Averbuck?

The Witness Averbuck: Yes.

The Court: Mr. Averbuck, you are ordered and directed to be and appear before the grand jury of this district, before whom you have heretofore ap-

peared, at their regular meeting place in this building on Tuesday, June 14, at 9:30 o'clock in the morning of that day, and then and there give answer to the following questions:

“Q. What name is on the door?”

Mr. Margolis: What page is that?

The Court: Page 45, line 9.

Page 46, the same order: “Q. Do you know Mrs. Dorothy Healey?”

Page 47, line 17, the same order: “Q. Mr. Averbuck, do you *know has* the books and records of the Los Angeles County Communist Party?” [298]

The same order: “Q. Now, do you know how many divisions of the Los Angeles County Communist Party there are?”

The same order: “Q. Do you know the names of any of the chairmen of any of the divisions of the Los Angeles County Communist Party?”

The same order: “Q. Do you know the names of the membership or social organizers of any of the divisions of the Los Angeles County Communist Party?”

The same order: “Q. Do you know the names of the financial organizers or financial directors of any of the divisions of the Los Angeles County Communist Party?”

The same order: “Q. Do you know the names of the officials of any of the divisions of the Los Angeles County Communist Party that have the books and records of that division of the Communist Party?”

The same order: “Q. Did you ever see Mrs.

Dorothy Healey with any of the books or records of the Los Angeles County Communist Party?"

Page 49, line 8, the same order: "Q. What did you say your occupation was?"

The answer was: "A. Organizer."

The question unanswered and to which the order will apply is: "Q. For whom?"

Mr. Averbuck, do you understand the order?

The Witness Averbuck: I do. [299]

The Court: Very well.

Mr. Elvador Claude Greenfield, you are ordered and directed to be and appear before the grand jury of this district, before whom you heretofore appeared, on Tuesday, June 14, at the hour of 9:30 o'clock in the morning and then and there give answers to the questions which I will now designate.

This is page 39, line 8: "Q. Now, do you know who has the books and records of the Los Angeles County Communist Party?"

Page 40, line 1, the same order: "Q. Was that the first time you ever saw her?" That refers to Mrs. Dorothy Healey.

The same order: "Q. Does she have the books and records of the Los Angeles County Communist Party, do you know?"

The same order: "Q. Do you know who has the books and records of the Los Angeles County Communist Party?"

The same order: "Q. Mr. Greenfield, do you know whether or not the Los Angeles County Communist Party is divided up into divisions?"



The same order: "Q. Can you tell us how many divisions there are?"

The same order: "Q. Will you tell us whether or not each division of the Communist Party of the Los Angeles County keeps books of the membership of that division?"

Page 41, line 7, the same order: "Q. Will you tell us the names of the chairmen or organizers of these divisions?" [300]

The same order: "Q. Will you tell us whether or not these divisions each have a membership or social director?"

The same order: "Q. Mr. Greenfield, we want to know the names of these people that hold these offices."

The same order: "Q. Well, does each division have a financial director? If so, will you give us their names?"

Page 43, line 11: "Q. Mr. Greenfield, I believe I asked you this morning whether or not you knew who had the books and records of the Los Angeles County Communist Party. Did I ask you that question? "A. I think you did.

"Q. What was your answer?"

Mr. Margolis: Is that two orders to answer the same question?

The Court: I do not think it is.

Mr. Margolis: He asked, did I ask you that question, and the answer was, I think you did, and then the question was, what was the answer, and he told what his answer was.

The Court: Just a moment. I will check that again.

Yes, that is on page 40 and he has been previously directed to answer that question.

Mr. Averbuck, do you understand the order of the court?

The Witness Averbuck: Is that for me again?

The Court: Mr. Greenfield—I beg your pardon—do you understand the order of the court? [301]

The Witness Greenfield: Yes.

Mr. Margolis: I don't think I understand it with respect to the last, your Honor. It is not quite clear.

The Court: He is only directed to answer that question once.

Do you understand it, Mr. Greenfield?

The Witness Greenfield: Yes, sir.

The Court: Very well.

Dorothy Healey, you are now ordered and directed to be and appear before the grand jury at its regular meeting place in this building, the same grand jury before whom you heretofore appeared, on Tuesday, June 14, at the hour of 9:40 o'clock in the morning of that day, and then and there give answer to the questions which I will now indicate.

Page 6, line 2: "Q. Will you tell us who you are organizer for?"

Line 20: "Q. Now, Mrs. Healey, do you know who has the books and records of the Los Angeles County Communist Party?"

Bottom of page 6 and top of page 7: "Q. Can you tell us, Mrs. Healey, whether or not the Los

Angeles County Communist Party has a chairman?"

The same order: "Q. Can you tell us whether or not it has an organizational secretary?"

And the same order as to this question: "Q. Can you tell us whether or not it has an education director?" [302]

The same order: "Q. Can you tell us whether or not it has a labor director?"

The same order: "Q. Can you tell us whether or not the membership or social director would have a list of the members of the Los Angeles County Communist Party?"

The same order as to the following question: "Q. Can you tell us whether or not they have a financial director?"

The same order as to the following question: "Q. Can you tell us whether or not the financial director would have a record of the dues paid by the members of the Los Angeles County Communist Party?"

The next question is not clear to me, at the top of page 8.

The same order will apply to the following question, beginning on line 8 of page 8: "Q. Can you tell us who has the record showing the dues paid by the membership of the Los Angeles County Communist Party?"

The same order: "Q. Now, Mrs. Healey, can you tell us the name of anyone who can give us that information I just asked you?"

The same order: "Q. But that information is available, is it not?"

The same order: "Q. Can you tell us how many

divisions there are in the Los Angeles or the Los Angeles County Communist Party?" [303]

The same order: "Q. Can you tell us how many sections there are in the divisions?"

The same order: "Q. Can you tell us how many clubs there are?"

The same order: "Q. Can you tell us how many squads there are?"

The same order: "Q. Mrs. Healey, can you tell us who is chairman of the eastern division of the Los Angeles County Communist Party?"

The same order: "Q. Can you tell us who is the chairman of the midtown division of the Los Angeles County Communist Party?"

The same order: "Q. Can you tell us who is the head of the southern division of the Los Angeles County Communist Party?"

The same order: "Q. Can you tell us who is the head of the western division of the Los Angeles County Communist Party?"

The same order: "Q. Can you tell us who is the head of the youth division of the Los Angeles County Communist Party?"

The same order: "Q. Can you tell us who is the head of the student section of that youth division?"

The same order: "Q. Mrs. Healey, each division has a chairman, does it not?"

The same order: "Q. Or sometimes called an organizer?" [304]

The same order: "Q. Does each division have an organizational secretary?"

The same order: "Q. Does each have a membership or social secretary?"

The same order: "Q. Does each have a membership or social director?"

The same order: "Q. Does the membership or social director of each division have a list of the membership of that division?"

The same order: "Q. Does each division have a financial director?"

The same order: "Q. Do not the membership director and the financial director have the books and records of the Los Angeles County Communist Party?"

The same order: "Q. Will you tell us who has the books and records of the Los Angeles County Communist Party?"

Page 11, line 22: "Q. Now, that statement with reference to Mrs. Dorothy Ray Healey, the organizational secretary of the Los Angeles County Communist Party, is that designation correct with reference to you?"

I think you might pay attention while I am directing an order to you, Mrs. Healey.

Page 14, line 3, the same order as to the question: "Q. What is your business address?"

Page 16, line 24. The previous question is, "You are [305] in charge of those records, are you not?" The answer is, "No."

The question which you are now ordered to answer is: "Q. Who is?" Meaning who is in charge of those records.

Page 17, you are ordered to answer the question:



“Q. Are there records in the place of business where you work?”

Mr. Margolis: May I suggest to the court that that question is a little ambiguous. Does it mean specific records or are they just referring to records kept of some kind, because I think our advice to our client has been based in part on our understanding of the question and it isn't clear to me.

The Court: They are talking about, “Did you ever have the records in your possession?”

Mr. Carter: What page are you now on, your Honor?

The Court: Page 17. The previous question is the one that I referred to back on page 16, “Well, then, we will modify the direction that you bring in the records of the Communist Party of Los Angeles County, whether they are in your possession or not.” Now who is in charge of those records? That is the records they are talking about.

Mr. Margolis: And you construe that question to mean records of the Communist Party?

The Court: The records of the Communist Party of the [306] Los Angeles County Committee of the Communist Party, whatever its designation is.

Mr. Margolis: I see. All right.

The Court: In other words, the question on page 17 means, are the records of the Los Angeles County Communist Party, or the records of the Los Angeles County Committee of the Communist Party, or the Los Angeles County Committee of the Communist Party, in the place of business where you work and those are the same records that are identified quite

obviously by the previous questions concerning the record which she is directed to answer.

Page 18, line 4, you are ordered to answer the following question: "Q. Do you know who does have control over the records?"

The question on page 19 at line 23 is apparently a repetition of the previous question; as is also the question on page 20 at line 20.

At page 21, line 24, you are ordered to answer this question: "Q. Who has those records that you say you do not have access to?"

Mr. Margolis: Where is that?

The Court: That is page 21, line 24.

On page 22 there is a question here but I do not understand it; nor on page 24, there is another refusal; likewise on page 25. I do not understand that. [307]

Page 26 there is another question there, line 4: "Q. Will you produce those records?" The witness said she declined to answer on the same grounds. Apparently she understood the question, and while it may not be clear to me it was apparently clear enough to her to decline to answer on the ground that it would be self-incriminating. She is therefore directed to answer that question.

Mr. Margolis: I don't see, your Honor. how you can order a question to be answered that your Honor doesn't understand. I don't understand what it is.

The Court: "Q. Will you produce those records?" They were talking about records.

Mr. Goldschein: Records previously discussed.

Mr. Margolis: There have been a lot of records

previously discussed, including all of the records of the Communist Party of Los Angeles County. If your Honor will go back to page 23 you can see what confusion there has been about discussion of the records and the government is taking the position they want every record that they have.

The Court: The books and records of the Communist Party pertaining to its membership. That is apparently what they are talking about on page 23.

Mr. Margolis: If you will look at line 14, your Honor, they say "whatever books or records of the Communist Party that you had with you." [308]

The Court: I think it is clear that they want the books and records of the Communist Party pertaining to its membership, and that is the Communist Party of Los Angeles County, or the Los Angeles County Committee of the Communist Party.

Mr. Margolis: That is what that is construed to refer to, is that correct?

The Court: That is right.

On the motion of the government for an order directing Dorothy Healey to produce the records of the Los Angeles County Committee of the Communist Party, or the Los Angeles County Communist Party, or the Communist Party of Los Angeles County, however it may be designated, the financial records, the membership records, the statistical data, that motion will go off calendar at the present time to be reset either on motion or of the court's own motion.

Now do you understand the order of the court, Mrs. Healey?

The Witness Healey: Yes, I do.

The Court: That you are to appear before the grand jury and answer the questions which I have designated and which your counsel has checked in the record?

The Witness Healey: Yes.

The Court: And that is next Tuesday, June 14th, at 9:30 o'clock in the morning.

Court is adjourned.

(Whereupon, at 11:00 o'clock a.m., court was adjourned.) [309]

### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of June, A.D., 1949.

/s/ AGNAR WAHLBERG,  
Official Reporter.

[Endorsed]: Filed June 28, 1949. [310]

June 14, 1949; 11:30 o'clock a.m.

The Court: Mr. Clerk, have you called the roll of the grand jury?

The Clerk: I have, your Honor, and there is a quorum present.

The Court: Mr. Foreman, you have a presentment to make?

Foreman Ahlswede: Yes, we have, your Honor.

The Court: Mr. Carter?

Mr. Carter: We desire to present the witness Max Appelman, also Matt Pelman.

Mr. Goldschein: May it please the court, Mr. Max Appelman was a witness who appeared before the grand jury in session this morning.

The Court: Excuse me, counsel. There was a case on trial here and I think they had just as well be excused until 2:00 o'clock.

Proceed, Mr. Goldschein.

Mr. Goldschein: Mr. Max Appelman, a witness who was subpoenaed and appeared before the Federal grand jury this morning was asked certain questions which he refused to answer claiming his privilege against self-incrimination. The grand jury insists that there is no self-incrimination involved in the questions asked or the answers that the witness might give. Therefore they ask the court to hear the questions [3\*] propounded to the witness and the answers he gave to determine whether or not the answers would tend to incriminate the witness for violation of a Federal offense, that is, whether there is any direct tendency to incriminate himself.

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\* Page numbering appearing at top of page of original Reporter's Transcript.



The Court: The witness Appelman is here?

Mr. Appelman: Yes.

The Court: You are Max Appelman?

Mr. Appelman: Yes, sir.

The Court: I see Mr. Margolis at the counsel table. Mr. Margolis is your counsel?

Mr. Margolis: I am here appearing for Mr. Appelman; that is right.

The Court: Let us have an answer from Mr. Appelman for the record. I do not doubt your word.

Mr. Appelman: What is it you want to know?

The Court: I want to know if Mr. Margolis is appearing in this proceeding as your attorney.

Mr. Appelman: Yes, sir.

The Court: Very well. Proceed.

Mr. Goldschein: Mr. E. L. Drummond.

E. L. DRUMMOND

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: E. L. Drummond. [4]

The Clerk: Take the stand.

Direct Examination

By Mr. Goldschein:

Q. This is Mr. E. L. Drummond?

A. Yes, sir.

Q. Mr. Drummond, you are the official court reporter attending the grand jury this morning?

A. I am.

Q. And sworn as such?                      A. Yes, sir.

(Testimony of E. L. Drummond.)

The Court: That is to say, the grand jury impaneled in the September term of 1948 and continued by order of court and under statute?

Mr. Goldschein: To complete the investigation originally begun.

The Court: Very well.

Q. (By Mr. Goldschein): Mr. Drummond, you were duly sworn as the official court reporter, were you not? A. Yes, sir.

Q. Now this morning were you present in the grand jury room when Mr. Max Appelman appeared as a witness? A. I was.

Q. Was he sworn?

A. He was sworn by the foreman. [5]

Q. Did you take down in shorthand the questions that were propounded to him and the answers that he gave? A. I did.

Q. Do you have those with you?

A. I have.

Q. Have you transcribed them?

A. No, sir.

Q. Will you please read the questions asked and the answers that he gave? A. Yes, sir.

#### QUESTIONS RELATING TO MAX APPELMAN

“By Mr. Goldschein:

“Q. Your full name is Max Appelman, is it?

“A. Yes, sir.

“Q. Where do you live?

(Testimony of E. L. Drummond.)

(Questions Relating to Max Appelman.)

“A. At the moment my address is 656 Hanover Street, Daly City.

“Q. How long have you been living there?

“A. Since, I don’t remember the exact date. The end of December.

“Q. Where were you living prior to that, Mr. Appelman?

“A. My address was 2441 McCready in this city.

“Q. Are you married, sir?      “A. Yes, sir.

“Q. Is your family living in the city here?

“A. No, my family is living at 656 Hanover Street in Daly City.

“Q. What is your business, sir?

“A. I am the personal representative of a man who has many enterprises.

“Q. Who are you employed by?

“A. Mr. John Danz.

“Q. Where is he located?

“A. In Seattle, Washington.

“Q. What is his business?

“A. He is a capitalist. He has investments in many businesses.

“Q. You say Seattle?

“A. That is right.

“Q. What is his address in Seattle?

“A. Palomar Theater Building, Seattle 1.

“Q. Were you ever employed by the United States Government in a civilian capacity?

“A. No, I was never employed.

“Q. Mr. Appelman, this grand jury is investi-

(Testimony of E. L. Drummond.)

(Questions Relating to Max Appelman.)

gating Federal employees who have made false statements to the Federal government with reference to their connection with certain organizations.

“Now, you having been an employee of the [7] Federal government, this investigation would not concern you, would it?      “A. I presume not.

“Q. Now, do you know Dorothy Healey?

“A. Yes, I know Dorothy Healey.

“Q. She is the organizational secretary of the Los Angeles County Committee of the Communist Party, is she not? You know that generally, or do you?

“A. I am afraid I would have to refuse to answer that question on the grounds of possible self-incrimination.

“Q. You mean simply knowing her would incriminate you?

“Do you read the People's World at any time?

“A. I read it occasionally.

“Q. Do you ever see her referred to in that paper as organizational secretary of the Communist Party?      “A. I do not recall.

“Q. You don't recall ever seeing it. Would you be inclined to believe the designation of her in the People's World as organizational secretary of the Communist Party of Los Angeles?

“A. I don't understand the question.

“Q. If you saw her referred to in the People's World [8] as organizational secretary of the Com-

(Testimony of E. L. Drummond.)

(Questions Relating to Max Appelman.)

munist Party of Los Angeles, would you think that was true?

“A. I couldn’t say whether I think it is true or not. I can say that it would not surprise me. She is known by reputation as a member of the Communist Party.

“Q. That is right.

“A. That is all I can answer to that. I don’t know whether it is true or false.

“Q. Don’t you know other than that—I am not interested in how you know, Mr. Appelman, I just want to know whether you do know that she is organizational secretary of the Communist Party.

“A. I must say again that I decline to answer that on the grounds of possible self-incrimination.

“Q. How long have you known her?

“A. I don’t know exactly. I have known her off and on and have seen her for many years.

“Q. Well, by ‘many years’ would you mean 10?

“A. I am trying to figure out what 10 years should bring me back to.

“Q. All right.

“A. Possibly. I am not sure.

“Q. How long have you been living in Los Angeles? “A. Since 1935. [9]

“Q. Do you know who the chairman of the Los Angeles County Communist Party is?

“A. I am afraid I will have to refuse to answer that question on the grounds of possible self-incrimination.



(Testimony of E. L. Drummond.)

(Questions Relating to Max Appelman.)

“Q. Do you know who the membership director of the Los Angeles County Committee of the Communist Party is?

“A. I must give the same answer.

“Q. Do you know who the financial director of the Los Angeles County Committee of the Communist Party is?

“A. I again must give the same answer.

“Q. Can you tell us how many divisions there are of the Los Angeles County Committee of the Communist Party? “A. I do not know.

“Q. Do you know whether or not each division—you know there are many of them, do you not?

“A. I do not know anything about the divisions.

“Q. Do you know anything about the sections, sir?

“A. I must decline to answer that on the grounds of possible self-incrimination.

“Q. Which are you claiming, the first or the [10] second?

“A. You asked me about the divisions. I don't know anything about the divisions.

“Q. Now, about the sections.

“A. I must decline to answer that on the grounds of possible self-incrimination.

“Q. Can you tell us whether or not each section of the Los Angeles County Communist Party keeps a membership list of the members in that section?

“A. I do not know anything about that.

“Q. Can you tell us whether each section has an organizer?

(Testimony of E. L. Drummond.)

(Questions Relating to Max Appelman.)

“A. I decline to answer that on the grounds of possible self-incrimination.

“Q. Can you tell us the names of any of the section organizers of the Los Angeles County Communist Party?

“A. I must decline to answer that on the grounds of possible self-incrimination.

“Q. Can you tell us whether each section has a membership director?

“A. I again must decline to answer that on the grounds of possible self-incrimination.

“Q. Have you also been known by the name of Matt Pelman? [11]

“A. Yes, sir.

“Q. How do you spell this Pelman?

“A. M-a-t-t, P-e-l-m-a-n.

“Q. One “l”? “A. That is right.

“Q. Where have you used that name?

“A. I decline to answer that on the grounds of possible self-incrimination.

“Q. You mean that telling us how or where you used that name would tend to incriminate you for a crime against the Federal government?

“A. Since you ask that question. I would like to consult with my attorney.

“Q. Just what are your duties now in your present work, what kind of work is it?

“A. I do a variety of things. I have bought real estate. I have investigated the possibilities of investments in various things. I have almost bought

(Testimony of E. L. Drummond.)

(Questions Relating to Max Appelman.)

real estate in investigating. That is generally the nature of my work.

“Q. Are you one of those financial experts so-called? We say so-called since the market crash.

“A. That is true. Well, that is for other people to say:

“Mr. Goldschein: All right, sir, we will recess.

“Mr. Carter: Wait outside.”

The Court: What was that question, where have you used that name? What name were they talking about?

The Witness: Matt ——

The Court: Hellman?

The Witness: Pelman, P-e-l-m-a-n.

The Court: Matt Pelman?

The Witness: That is right.

The Court: Cross-examine.

#### Cross-Examination

By Mr. Margolis:

Q. Have you read to us all of the matters that occurred before the grand jury with respect to Max Appelman this morning?

A. No. He was later recalled at 11:10.

Mr. Goldschein: Read the balance of it, if there is any other.

The Court: I thought that was all of it.

The Witness: No, he was recalled.

The Court: Very well.

(Testimony of E. L. Drummond.)

(Questions Relating to Max Appelman.)

Direct Examination (Continued)

By Mr. Goldschein:

Q. Will you proceed, Mr. Drummond?

A. Yes.

“By Mr. Goldschein: [13]

“Q. Mr. Max Appelman recalled.

“Mr. Appelman, do you know who has the books and records of the Los Angeles County Communist Party or the Los Angeles Committee of the Communist Party?

“A. I do not know.

“Q. Do you know who is in charge of their office in Los Angeles?

“A. I do not know.

“Q. Have you ever been to their offices in Los Angeles?

“A. I decline to answer that on the grounds of possible self-incrimination.

“Q. You say you don't know who is in charge of the office here in Los Angeles?

“A. I don't know.

“Q. Did you know who was in charge when you were living here?

“A. I decline to answer that on the grounds of possible self-incrimination.

“Q. Did you know who had charge of the books and records when you lived here?

“A. I did not know.

“Mr. Goldschein: That is all, sir. You will wait out in the anteroom.” [14]

Then he was recalled to the room and ordered

(Testimony of E. L. Drummond.)

to attend in Judge Hall's court on the second floor.

The Court: That is all of it?

The Witness: That is all.

Cross-Examination—(Continued)

By Mr. Margolis:

Q. Have you given us everything now that occurred in the grand jury room this morning with respect to Mr. Appelman? A. I have.

Mr. Margolis: No further questions.

The Court: Proceed.

Mr. Goldscheim: May it please the court, the government and the grand jury insist there is nothing in those questions the answer to which would tend to incriminate the witness for the violation of a Federal offense. We respectfully request the court to instruct the witness that he must answer the questions.

Further suggest, may it please the court, that the witness may have some reason other than that which he would like to state in open court but that he would like to state privately to the court outside of the hearing of government and defense counsel as to why the answers would tend to incriminate him. We respectfully suggest that if the witness so requests, the court give him an opportunity to explain his position [15] privately.

Mr. Margolis: Your Honor please, in order to save time I suggest that we be permitted to incorporate in full the record which was made in connection with the presentments or orders to answer



(Testimony of E. L. Drummond.)

questions against the respondents Healey, Averbuck, Newman and Greenfield, which hearings were held in this courtroom on Friday, June 10.

The Court: Which have heretofore been held.

Mr. Margolis: And Saturday, June 11, together with the records which were incorporated in those records with the same force and effect as though Mr. Appelman had actually been present at that time and the showing had been made with respect to him.

The Court: It is ordered that all matters and things presented in objection on the hearings which you have designated may be deemed to be offered and in objection at this time with the same force and effect as if Mr. Appelman had been present at that time and to the same force and effect as if they were again reincorporated here ad extenso in haec verba. [16]

\* \* \*

Mr. Goldschein: To grant Mr. Margolis' motion would, in effect, be drawing down that so-called iron curtain on the grand jury. The grand jury would be estopped from investigating further. The court would, in effect, say that the grand jury has no right to investigate these matters, you have no right to continue on and on and on until we find somebody who will give us the information that we are seeking. And certainly that is not the law. The grand jury has a right from its inception to make inquiry into these matters and as long as these witnesses defy the orders of the court, just so long

will the grand jury continue with these matters until they lift that veil of secrecy that seems to pervade all witnesses who come before it in this matter.

The Court: I see no reason to change the views that I have heretofore expressed concerning the objections which have heretofore been offered, and will adhere to those views.

In so far as the suggestion is made that the matter be postponed or be dropped until the Circuit Court of Appeals gets through with it, that would amount to a declaration by this court that if a witness on inquiry before a grand jury chooses to object for any ground which he may either consider frivolous or good, no matter how conscientious he may believe it to be, that the arm of the government, which is an exceedingly important arm in the matter of the maintenance of law and order and maintaining the government as a government of [19] laws, would be completely stopped. You could say a witness objects and therefore an inquiry must stop.

I have no idea when the Circuit Court of Appeals will rule on the question, and I do not think it was ever intended that the lower court should stop performing its duties because the Circuit Court of Appeals has some question under consideration and they have not been able to get around to deciding it. In other words, I think the case is postured here where it requires a decision on my part, and in adherence to what I consider to be my duty I will make it.

The questions, as I took them down, to which the

witness refused to answer on the ground he might incriminate himself, and which he is now ordered to answer, are as follows—

Mr. Margolis: May I ask your Honor to read them slowly so I can get them?

The Court: Very well.

Q. Do you know whether or not Dorothy Healey is the organizing secretary of the Los Angeles County Committee of the Communist Party?

Q. Do you know who the chairman of the Los Angeles County Communist Party is?

Q. Do you know who the membership director of the Los Angeles County Committee of the Communist Party is?

Q. Do you know who the financial director of the Los Angeles County Committee of the Communist Party is? [20]

Q. Do you know anything about the sections of the Los Angeles County Committee of the Communist Party?

Q. Do you know whether or not each section has an organizational director of the Los Angeles County Committee of the Communist Party?

Q. Do you know the names of any organizational directors for any sections of the Los Angeles County Committee of the Communist Party?

Q. Do you know whether or not each section has a membership director?

Q. Where have you used the name Matt Pelman, or where have you used that name?

Q. Have you ever been to their offices in Los Angeles?

The previous questions indicated they were talking about the offices of the Los Angeles County Committee of the Communist Party.

Mr. Margolis: Offices in Los Angeles?

The Court: In Los Angeles.

The last question: Q. Did you know who was in charge of that office while you were living here? And I understood the witness to have stated that he lived here until last December, which was during a period or during a portion of the period of this inquiry.

Mr. Appelman, do you understand the order of the court?

Mr. Appelman: Yes, sir. [21]

The Court: When is the grand jury going back?

Mr. Goldschein: 2:00 o'clock, may it please the court.

Mr. Margolis: If your Honor please, I have a problem with respect to that. Mrs. Healey has been ordered back here at 2:00 o'clock and now the government is asking that Mr. Appelman be ordered back here at 2:00 o'clock, and other witnesses have been ordered back, as I understand it, before the grand jury at 2:00 o'clock. I can't be in both places at the same time and I would like to ask—

The Court: I have some other matters to take up at 2:00 o'clock.

Mr. Margolis: May I go to the grand jury and ask that these matters be held until I get here?

The Court: I will hold them until you get down here. I imagine I will have other matters to keep me busy until you do.

Mr. Margolis: I understand then that the matter will not proceed until we come down?

The Court: Yes.

Mr. Appelman, you are now ordered and directed to be and appear before the grand jury at its regular meeting place on the sixth floor of this building, the same grand jury before whom you appeared this morning, at the hour of 2:00 o'clock today, and then and there answer the questions which I have heretofore indicated you should answer, and the objections to [22] which are overruled.

Do you understand that order?

Mr. Appelman: I understand.

The Court: Very well. Recess until 2:00 o'clock.

### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 24th day of June, A.D., 1949.

/s/ AGNAR WAHLBERG,

Official Reporter.

[Endorsed]: Filed July 28, 1949. [24]



June 14, 1949; 4:00 o'Clock P.M.

The Clerk: Mr. Carter has an exparte matter, your Honor.

The Court: Mr. Carter?

Mr. Carter: The grand jury is present, and a quorum is present.

The Court: Has the roll been called?

The Clerk: Yes, your Honor. A quorum is present.

The Court: Very well.

Mr. Carter: The grand jury desires to make a presentment of criminal contempt to five of these witnesses.

The Court: Pass them up to me.

(The documents referred to were passed to the court.)

The Court: Dorothy Ray Healey present?

The Defendant Healey: Yes.

The Court: Have you passed her a copy, counsel?

Mr. Goldschein: No, sir.

Mr. Carter: No, I have not.

The Court: I will hand them to the bailiff.

Horace Morton Newman, Jr., is present.

Max Appelman is present.

Elvador G. Greenfield is present.

And Alvin Abram Averbuck is present.

Mr. Margolis and Mr. McTernan are counsel for each of [5\*] you? (Assent.)

Is that correct, Mrs. Healey?

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\* Page numbering appearing at top of page of original Reporter's Transcript.

The Defendant Healey: I beg your pardon?

The Court: Mr. Margolis and Mr. McTernan are presently counsel for each of you?

The Defendant Healey: That is right.

The Court: Very well. The record will show that Mr. Averbuck, Mr. Greenfield, Mr. Appelman, Mr. Newman and Mrs. Healey are present in court with their counsel, Mr. Margolis and Mr. McTernan.

This is a motion which you, as foreman of the grand jury and on behalf of the grand jury, wish to present and file?

Foreman Ahlswede: It is, your Honor.

The Court: Very well. The Clerk will receive them and file them and will arraign each of the defendants.

Do you have more copies or just your office copies?

Mr. Carter: We have the office copies only. Two copies were filed with the Clerk. There is generally one copy for the court and one for the defendant.

The Court: I will hand the court's copy to defendants' counsel in each case.

Mr. Goldscheine: There is the other copy.

Mr. Carter: I assumed that that was the purpose of arraigning the defendants.

The Court: That is correct. [6]

Do you have a copy that I might look at in the meanwhile here while the Clerk has the original?

(The document referred to was passed to the court.)

The Clerk: These are filed, your Honor.

The Court: Very well. You will arraign Mr. Greenfield.

The Clerk: Elvador G. Greenfield, that is your full, true and correct name?

The Defendant Greenfield: That is right.

The Clerk: You are informed that a grand jury presentment has been filed in this court charging you with criminal contempt in violation of Section 401, Title 18 United States Code.

You are entitled to be represented by counsel and a trial by the court. Is Mr. Ben Margolis and Mr. John T. McTernan your counsel of record?

The Defendant Greenfield: That is right.

The Court: Do you waive further reading, Mr. Margolis?

Mr. Margolis: Waive further reading.

The Court: Very well. Are you ready to plead?

Mr. Margolis: Yes, we are ready to plead.

The Court: The record will show that counsel for the defendant has heretofore, that is to say, within the last few moments, been handed a copy of the presentment.

Ascertain the defendant's plea.

The Clerk: Mr. Greenfield, what is your plea, guilty or [7] not guilty?

The Defendant Greenfield: Not guilty.

The Court: You will stand aside on the matter of setting for trial.

Mr. Averbuck.

The Clerk: Mr. Alvin Abram Averbuck, that is your full, true and correct name?

The Defendant Averbuck: That is right.

The Clerk: You are informed that a grand jury presentment has been filed in this court today charging you with criminal contempt in violation of Section 401, Title 18 United States Code.

You are entitled to be represented by counsel and a trial by the court. Is Mr. Margolis and Mr. John T. McTernan your counsel of record?

The Defendant Averbuck: That is right.

The Clerk: Do you waive further reading?

Mr. Margolis: Waive further reading.

The Clerk: Are you ready to plead?

The Defendant Averbuck: That is right.

The Clerk: What is your plea, guilty or not guilty?

The Defendant Averbuck: What I plead is that I am positive that I am not guilty.

The Court: Stand aside.

Mr. Appelman. [8]

The Clerk: Mr. Max Appelman, is that your full, true and correct name?

The Defendant Appelman: That is correct.

The Clerk: You are informed that a grand jury presentment has been filed in this court today charging you with criminal contempt in violation of Section 401, Title 18 United States Code.

You are entitled to be represented by counsel and a trial by the court: Is Mr. Margolis and Mr. McTernan your counsel of record?

The Defendant Appelman: That is true.

The Clerk: Waive further reading, Mr. Margolis?

Mr. Margolis: Waive further reading.

The Clerk: Are you ready to plead, Mr. Appelman?

The Defendant Appelman: Not guilty.

The Court: Stand aside.

Mr. Newman.

The Clerk: Horace Morton Newman, Jr., is that your full, true and correct name?

The Defendant Newman: Yes.

The Clerk: You are informed that a grand jury presentment has been filed in this court today charging you with criminal contempt in violation of Section 401, Title 18, United States Code.

You are entitled to be represented by counsel and a [9] trial by the court. Is Mr. Margolis and Mr. McTernan your counsel of record?

The Defendant Newman: Yes.

The Clerk: Do you waive further reading, Mr. Margolis?

Mr. Margolis: Waive further reading.

The Clerk: Are you ready to plead, Mr. Newman?

The Defendant Newman: Yes.

The Clerk: What is your plea, guilty or not guilty?

The Defendant Newman: Not guilty.

The Court: Stand aside.

Mrs. Healey.



The Clerk: Dorothy Ray Healey, is that your full, true and correct name?

The Defendant Healey: I am also Mrs. Connolly.

The Clerk: Dorothy Ray Healey Connolly?

The Defendant Healey: Yes.

The Court: How do you wish to be known, Dorothy Ray Healey also known as——

The Defendant Healey: I prefer to be known as Mrs. Dorothy Ray Healey.

The Court: Mrs. Dorothy Ray Healey?

The Defendant Healey: Right.

The Court: Very well. Your true name is, however, Dorothy Ray Healey Connolly?

The Defendant Healey: That is right. [10]

The Court: Very well.

The Clerk: You are informed that a grand jury presentment has been filed in this court today charging you with criminal contempt in violation of Section 401, Title 18 United States Code.

You are entitled to be represented by counsel and a trial by the court: Is Mr. Margolis and Mr. McTernan your counsel of record?

The Defendant Healey: They are.

The Clerk: Waive further reading, Mr. Margolis?

Mr. Margolis: Waive further reading.

The Clerk: Are you ready to plead, Mrs. Healey?

The Defendant Healey: Yes.

The Clerk: What is your plea, guilty or not guilty?

The Defendant Healey: Not guilty.

The Court: Very well. You may stand aside.

Each of the witnesses who have been charged with criminal contempt have pleaded not guilty. It is a matter now of setting the cases for trial.

Incidentally, the record will show that as to each of the defendants prior to their arraignment counsel were handed copies of the presentment as they were handed up to the court. [11]

\* \* \*

The Court: I will set it for trial on Thursday, June 23, at the hour of 10:00 o'clock in the morning. That is a week from this coming Thursday. I have to be in Fresno Monday for a calendar there which will probably take three days.

Mr. Margolis: In the meantime may these defendants be released pending that hearing, your Honor?

The Court: What is the attitude of the United States [15] Attorney?

Mr. Carter: We recommend bail. We have heard a lot of talk about how people always appeared in response to these matters, and some time back we had a spectacle of an individual who left the country when he was under \$23,000 bail——

Mr. Margolis: Is it the government's contention that these people are in the same category? If it is I think it ought to be stated in the record.

The Court: The suggestion is made by the defendants that that is the reason why they would answer the question, because they might be considered to be in the same category.

Mr. Margolis: Apparently the government takes the position that they are.

The Court: Let me see. Mr. Appelman, his subpoena was out for him since October 25?

Mr. Margolis: He is out on bail presently on \$1500.

The Court: And Mr. Newman, a subpoena was out for him since October 25?

Mr. Carter: That is right.

The Court: When was he first found?

Mr. Carter: He was found about——

The Court: In April?

Mr. Carter: Yes, I would say a month ago.

The Court: And Mr. Greenfield?

Mr. Carter: I don't have the exact dates. It was sometime [16] after the first of the year, I believe.

The Court: In other words, each of the defendants here except Mrs. Healey, has had a bench warrant out from the court since last November?

Mr. Margolis: No, your Honor.

Mr. Carter: There was no bench warrant for Mrs. Healey, nor for Mr. Averbuck, nor for—yes, I think there was a bench warrant for Mr. Appelman.

Mr. Goldschein: Yes.

Mr. Margolis: There wasn't one for Mr. Greenfield.

Mr. Carter: There was a bench warrant for Greenfield, wasn't there?

The Defendant Greenfield: Yes.

Mr. Margolis: Excuse me. I am wrong.

These people on bench warrants are already out on bail. I want to call your Honor's attention to the fact that these people have appeared on a number of times in court already.

The Court: Mr. Newman has no bail now of any kind, does he?

Mr. Margolis: That is correct.

The Court: And I set the bail at \$4000 when he was arrested on a bench warrant?

Mr. Margolis: That is correct, your Honor.

The Court: I will set his bail at \$4000 now.

Mr. Margolis: It seems to me that that is an exorbitant [17] bail for a misdemeanor. [18]

\* \* \*

The Court: The bond of each one of them will be \$4000. The trial will be set as of the time indicated.

Mr. Margolis: In addition, as to Mr. Appelman who is on a \$1500 bond?

The Court: His \$1500 bail will be exonerated. Any previous bail is exonerated and the bail is now set at \$4000.

Mr. Margolis: Mr. Greenfield is presently on \$4000 bail.

The Court: His previous bail for any previous appearance is now exonerated and the bail is now fixed at \$4000 for their appearance in response to this order for setting the case for trial for each one of the defendants. [19]

Mr. Margolis: May we have until tomorrow morning to post that bail, or may the defendants be released in the meantime on the assurance, your Honor, that we will post it early tomorrow morning? It is very late, it is 4:20 in the afternoon, we have been here since 2:00 o'clock sitting around waiting, your Honor. [20]

\* \* \*

The Court: Very well. The defendants may have until 6:30 to post bail. In the meantime they will be committed.

Mr. Margolis: May they be held upstairs until 6:30?

The Court: Yes. The marshal will hold them in the marshal's office in this building until 6:30, and if at that time bail in the sum indicated by the court has been fixed they [21] shall be released, and if not they shall not be committed to the bail, that is, to the regular place of confinement other than the marshal's office.

Court is adjourned.

(Whereupon, at 4:25 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Thursday, June 23, 1949.) [22]

\* \* \*

June 23, 1949; 10:00 o'Clock A.M.

(Other court matters.)

The Clerk: Nos. 20743, United States v. Max Appelman; 20744, United States v. Alvin Abram Averbuck; 20745, United States v. Elvador G. Greenfield; 20746, United States v. Dorothy Ray



Healey, and 20747, United States v. Horace Morton Newman, Jr., for trial.

Mr. Margolis: Ready, your Honor.

Mr. Carter: Ready for the government.

The Court: All the defendants are present in person?

Mr. Margolis: They are, your Honor.

The Court: And by counsel?

Mr. Margolis: Yes, your Honor.

The Court: Very well. Proceed.

Mr. Goldschein: Mr. E. L. Drummond, please.

### E. L. DRUMMOND

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: E. L. Drummond.

The Clerk: Your address, Mr. Drummond?

The Witness: 106 West Third Street.

The Clerk: Be seated. [24]

### Direct Examination

By Mr. Goldschein:

Q. This is Mr. E. L. Drummond?

A. Yes, sir.

Q. What is your business, Mr. Drummond?

A. Court reporter.

Q. Are you the official court reporter for the United States District Court for the Southern District of California?      A. No.

(Testimony of E. L. Drummond.)

Q. You are the grand jury reporter?

A. For the grand jury; yes.

Q. Were you duly sworn to take down the testimony of the witnesses that appeared before the grand jury?      A. Yes.

Q. And transcribe it?      A. Yes, sir.

Q. Did you, on June 19, 1949, at 10:40 a.m. appear in the grand jury room of the United States District Court in Los Angeles?

The Court: June 19?

Mr. Goldschein: June 19.

The Court: I have before me Max Appelman's allegation which is June 14.

Mr. Goldschein: I am starting with Newman. I will begin with Appelman. [25]

The Court: I do not care what order you take them up in. That is the way they are on the calendar, and that is the way they are numbered numerically.

Q. (By Mr. Goldschein): On June 14, 1949, Mr. Drummond, did you take down in shorthand——

The Court: Were you then previously sworn as a court reporter?

The Witness: Yes, your Honor.

Q. (By Mr. Goldschein): Were you in the grand jury on that day, June 14, 1949?

A. I was.

Q. Were you there when the witness Max Appelman appeared before the grand jury?

A. I was.

(Testimony of E. L. Drummond.)

Q. Were you there when he was sworn as a witness?      A. I was.

Q. Was he asked questions before the grand jury?      A. He was.

Q. Did he answer questions before the grand jury?      A. He did.

Q. Did he make answers to the questions?

A. He did.

Q. Did you take down in shorthand those questions and [26] transcribe them?      A. Yes, sir.

Q. Did you do that accurately?

A. Yes, sir.

Q. Do you have with you the questions that were asked him and the answers that he made transcribed?

A. I have my notes. I haven't the transcript. The transcript has been delivered to the United States Attorney.

Q. You did transcribe them, however?

A. Yes, sir.

Q. Will you examine this transcript and tell us whether or not it is the transcript that you made of the testimony of Max Appelman?

A. (Examining document): It is.

Q. Will you read into the record, please, sir, the questions asked and the answers made by Max Appelman?      A. Yes, sir.

(Testimony of E. L. Drummond.)

“MAX APPELMAN

called as a witness before the grand jury, having been first duly sworn by the Foreman, was examined and testified as follows:

“Examination

“By Mr. Goldschein:

“Q. Your full name is Max Appelman, is it?

“A. Yes, sir. [27]

“Q. Where do you live?

“A. At the moment my address is 656 Hanover Street, Daly City.

“Q. How long have you been living there?

“A. Since, I don't remember the exact date. The end of December.

“Q. Where were you living prior to that, Mr. Appelman?

“A. My address was 2441 McCready in this city.

“Q. Are you married, sir?

“A. Yes, sir.

“Q. Is your family living in the city here?

“A. No, my family is living at 656 Hanover Street in Daly City.

“Q. What is your business, sir?

“A. I am the personal representative of a man who has many enterprises.

“Q. *You* are you employed by?

“A. Mr. John Danz.

“Q. Where is he located?

(Testimony of E. L. Drummond.)

(Statement by Max Appelman.)

“A. In Seattle, Washington.

“Q. What is his business?

“A. He is a capitalist. He has investments in many businesses.

“Q. You say Seattle? [28]

“A. That is right.

“Q. What is his address in Seattle?

“A. Palomar Theater Building, Seattle 1.

“Q. Were you ever employed by the United States government in a civilian capacity?

“A. No, I was never employed.

“Q. Mr. Appelman, this grand jury is investigating Federal employees who have made false statements to the Federal Government with reference to their connection with certain organizations.

“Now, you never having been an employee of the Federal Government, this investigation would not concern you, would it?

“A. I presume not.

“Q. Now, do you know Dorothy Healey?

“A. Yes, I know Dorothy Healey.

“Q. She is the organizational secretary of the Los Angeles County Committee of the Communist Party, is she not? You know that generally, or do you?

“A. I am afraid I would have to refuse to answer that question on the grounds of possible self-incrimination.

“Q. You mean simply knowing her would incriminate you?



(Testimony of E. L. Drummond.)

(Statement by Max Appelman.)

“A. I have already said that I know her. [29]

“Q. And knowing what her business is would incriminate you?

“Do you read the People’s World at any time?

“A. I read it occasionally.

“Q. Do you ever see her referred to in that paper as organizational secretary of the Communist Party?

“A. I do not recall.

“Q. You don’t recall ever seeing it. Would you be inclined to believe the designation of her in the People’s World as organizational secretary of the Communist Party of Los Angeles?

“A. I don’t understand the question.

“Q. If you saw her referred to in the People’s World as organizational secretary of the Communist Party of Los Angeles, would you think that was true?

“A. I couldn’t say whether I think it is true or not. I can say that it would not surprise me. She is known by reputation as a member of the Communist Party.

“Q. That is right.

“A. That is all I can answer to that. I don’t know whether it is true or false.

“Q. Don’t you know other than that—I am not interested in how you know, Mr. Appelman, I just want to know whether you do know that she is organizational secretary of the Communist Party.

“A. I must say again——”

(Testimony of E. L. Drummond.)

(Statement by Max Appelman.)

Q. Excuse me. Mr. Drummond, were you present in the grand jury room when Mr. Appelman was recalled a second time after an order of the court was made on him? A. I was.

Q. Were you present when questions were asked him and answers given by him before the grand jury the second time that day?

A. Yes, sir.

Q. Did you take down in shorthand and transcribe the testimony he gave at that time?

A. Yes, sir.

Q. Do you have that in that same record?

A. I have it.

Q. Now will you read that? What you just read you read on a previous occasion in this court?

A. Yes, sir.

The Court: That is to say, that was the first appearance of Mr. Appelman before the grand jury?

The Witness: Yes, sir.

The Court: Now what you are asking is his second appearance after the presentment by the grand jury to the court?

Mr. Goldschein: That is right, and after the court ordered [31] him to answer.

The Court: Very well.

The Witness: It really was his third appearance because he was recalled at 11:10 for some more

(Testimony of E. L. Drummond.)

(Statement by Max Appelman.)

questions and then recalled again after his appearance in court at 2:23.

Mr. Goldschein: That is right.

Q. Will you continue, please?

A. Yes, sir.

“Examination

“By Mr. Goldschein:

(Mr. Max Appelman recalled.)

“Q. Mr. Appelman, you were in Judge Hall’s courtroom this morning, were you not?

“A. Yes, sir.

“Q. You heard Judge Hall direct you to answer certain questions that were propounded to you before the grand jury this morning?

“A. Yes, sir.

“Q. I will read those questions off to you, and you will answer them as directed, please, sir.

“Do you know that Dorothy Healey is the organizational secretary of the Los Angeles County Committee of the Communist Party?

“A. I must give you the same answer. I decline to answer on the grounds that it may incriminate me. [32]

“Q. The second question: Do you know who the chairman of the Los Angeles County Communist Party is? “A. The same answer.

“Q. The third question is: Do you know who the membership director of the Los Angeles County Committee of the Communist Party is?

(Testimony of E. L. Drummond.)

(Statement by Max Appelman.)

“A. The same answer, sir.

“Q. The fourth question: Do you know who the financial director of the Los Angeles County Committee of the Communist Party is?

“A. The same answer.

“Q. The fifth question: Do you know anything about the sections? That is, sections of the Los Angeles County Communist Party.

“A. Same answer.

“Q. Sixth: Can you tell us whether each section has an organizer? “A. Same answer.

“Q. Seventh: Can you tell us the names of any of the section organizers of the Los Angeles County Communist Party? “A. Same answer.

“Q. Eighth: Can you tell us whether each section has a membership director? [33]

“A. Same answer.

“Q. Will you tell us, No. 9, Mr. Appelman, where have you used that name, Matt Pelman?

“A. Same answer.

“Q. Tenth: Have you ever been to their offices in Los Angeles? That is, the offices of the Los Angeles County Communist Party.

“A. Again I must answer in the same way.

“Q. 11: Did you know who was in charge when you were living here? That is, who was in charge of the offices of the Los Angeles County Committee in Los Angeles?

(Testimony of E. L. Drummond.)

(Statement by Max Appelman.)

“A. I must answer in the same fashion.

“Q. You, of course, realize that those are the questions that Judge Hall directed you to answer this morning? I didn’t hear your answer.

“A. I heard him so instruct me.

“Q. And you refuse to answer?

“A. I feel that I cannot answer on the grounds that it may personally incriminate me.”

Q. Were there any other questions asked him or answers given by him?

A. Nothing except Mr. Goldschein said, “All right, sir. Will you wait in the anteroom?”

Mr. Goldschein: That is all with reference to Max [34] Appelman, if the court please.

The Court: Cross-examine.

Mr. Margolis: No questions.

The Court: How do you wish to proceed, as to each one separately or to have the government present all of the matters? Each defendant is entitled to proceed separately.

Mr. Margolis: We would not insist upon that method of procedure, your Honor: I think it would facilitate the matter, because our defensive material will be common to all and I see no need for repeating it.

The Court: Very well.

I think the witness will have to be sworn in each case. This is Case No. 20744, United States v. Alvin Abram Averbuck.



## E. L. DRUMMOND

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: E. L. Drummond.

The Clerk: Take the stand.

## Direct Examination

By Mr. Goldschein:

Q. This is Mr. E. L. Drummond?

A. Yes, sir.

Q. Mr. Drummond, are you the official grand jury reporter for the United States District Court for the Southern [35] District of California?

A. I am one of them.

Q. Were you present in the grand jury room on June 14, 1949, when Alvin Abram Averbuck appeared before the grand jury? A. I was.

Q. Were you sworn as the official court reporter? A. I was.

Q. For the grand jury? A. Yes, sir.

Q. Were you present when Alvin Abram Averbuck was sworn as a witness before the grand jury?

A. He was not sworn that morning; he was recalled from a previous appearance when he was sworn.

Q. He was previously sworn? A. Yes, sir.

Q. Now on that morning did you take down in shorthand and transcribe all the questions asked Mr. Averbuck?

(Testimony of E. L. Drummond.)

The Court: What date?

Mr. Goldschein: June 14, 1949.

Q. And the answers he gave? A. I did.

Q. Will you examine this transcript, Mr. Drummond, and tell us whether or not you can identify it as the one that you transcribed?

A. (Examining document): It is. [36]

Q. Will you read, please, sir, the questions that were asked him and the answers he gave?

A. Yes.

“Examination

“By Mr. Carter:

(Mr. Alvin Abram Averbuck recalled.)

“Q. Mr. Averbuck, you have previously been before this grand jury and have been asked certain questions which you have refused to answer, claiming the privilege against self-incrimination. You are familiar with that?

“A. That is correct.

“Q. You were in the courtroom of Judge Hall on June 9, 10 and 11, Thursday, Friday and Saturday of last week, were you not?

“A. That is correct.

“Q. And you were present on June 11, when Judge Hall made an order that you answer certain questions? “A. That is correct.

“Q. Now, Mr. Averbuck, in order to remove any possible doubt in your mind or any fear of Federal prosecution, we are prepared at this time to offer you immunity in the broadest possible terms, I as

(Testimony of E. L. Drummond.)

(Statement By Alvin Abram Averbuck.)

United States Attorney, Mr. Max Goldschein as Special Assistant to the Attorney General, and under the authority of the Attorney General.

“We propose to promise and offer to you that if you accept this proposal no testimony that you may give may be used against you hereafter at any criminal prosecution, and we so make that proposal to you. I say ‘we,’ Mr. Goldschein and myself acting in our official capacities.

“There is a public record of this statement here before the court reporter for this grand jury. Do you understand what I have told you?

“A. I do, but my attorney advises that you have no right to make such a grant, that it is not in your power, that such an offer and grant is not within your power.

“Q. You understand further that where such a proposal is made by a Federal officer that any court, District Court, any Federal Court, would feel it would be unfair and inequitable and unjust to thereafter prosecute you on any testimony that you give, when you give it relying upon that kind of an offer and that kind of a proposal?

“A. Well, I stand by the same answer.

“Q. Now, Mr. Averbuck, I am going to ask you now seriatim the questions which Judge Hall on June [38] 11th found would not incriminate you and ordered you to answer, referring to page 45 of the court transcript of May 26th.

(Testimony of E. L. Drummond.)

(Statement By Alvin Abram Averbuck.)

“Mr. Goldschein: Mr. Averbuck, that proposal was made to you not because the government thought that the answers which you would give would tend to incriminate you; as a matter of fact, the government is convinced that they would not tend to incriminate you for the violation of any Federal offense, but simply to allay any fears that you might have on the subject. That is all.

“Q. (By Mr. Carter): Referring to page 45 of the court transcript of May 26, 1949, you were asked about your work and referred to an office building in which you occasionally worked. The question was asked you as follows:

“Question No. 1: What name is on that door? I am asking you the question. That is the question which Judge Hall ordered you to answer.

“A. I refuse to answer on the grounds that it would possibly incriminate me.

“Q. No. 2: Do you know Mrs. Dorothy Healey?

“A. The same answer.

“Q. No. 3: Mr. Averbuck, do you know who has the books and records of the Los Angeles County [39] Communist Party?

“A. The same answer.

“Q. 4: Do you know how many divisions of the Los Angeles County Communist Party there are?

“A. The same answer.

“Q. No. 5: Do you know the names of any of the chairmen of any of the divisions of the Los Angeles County Communist Party?

(Testimony of E. L. Drummond.)

(Statement By Alvin Abram Averbuck.)

“A. The same answer.

“Q. 6: Do you know the names of the membership or social organizers of any of the divisions of the Los Angeles County Communist Party?

“A. The same answer.

“Q. 7: Do you know the names of the financial organizers or financial directors of any of the divisions of the Los Angeles County Communist Party?

“A. Same answer.

“Q. 8: Do you know the names of the officials of any of the divisions of the Los Angeles County Communist Party?

“A. Same answer.

“Q. 9: Did you ever see Mrs. Dorothy Healey with any of the books and records of the Los Angeles County Communist Party?

“A. The same answer. [40]

“Q. You were asked what your occupation was and you answered organizer. Question No. 10 was: For whom?

“A. The same answer.

“Mr. Carter: All right. You may be recessed at this time. You will wait in the anteroom.”

The Court: Is that the testimony given by Mr. Averbuck at that time?

The Witness: It was.

The Court: Very well. Cross-examine.

Mr. Margolis: No cross-examination.

The Court: No. 20745, United States v. Elvador G. Greenfield is the next one.



E. L. DRUMMOND

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: E. L. Drummond.

The Clerk: Be seated, please.

Direct Examination

By Mr. Goldschein:

Q. This is Mr. E. L. Drummond?

A. Yes, sir.

Q. Mr. Drummond, are you the official grand jury reporter for the United States District Court for the Southern [41] District of California?

A. I am one of them.

Q. Were you duly sworn as such?

A. Yes, sir.

Q. Did you appear before the United States District Court grand jury on June 14, 1949?

A. I did.

Q. Were you present when the witness Elvador Claude Greenfield was recalled before the grand jury?

A. I was.

Q. Were you present when he was sworn as a witness on his first appearance?

A. I was.

Q. Did you take down in shorthand and properly transcribe the testimony that Mr. Greenfield gave before the grand jury?

A. I did.

Q. Will you examine this transcript, please, sir, and tell us whether or not you can identify it as

(Testimony of E. L. Drummond.)

the questions taken down by you and the answers he gave?

A. (Examining document): It is.

The Court: On June 14?

Q. (By Mr. Goldschein): On June 14, 1949?

A. Yes, sir. [42]

Q. Will you read that transcript, please, sir?

A. Yes, sir.

“Examination

“By Mr. Carter:

“Q. Elvador Claude Greenfield recalled, is that right? “A. Correct.

“Q. Mr. Greenfield, you have previously been before this grand jury and have been asked certain questions which you have declined to answer upon the ground you might incriminate yourself.

“A. Correct.

“Q. Were you in Judge Hall's courtroom June 9, 10 and 11 of this month?

“A. Yes, sir.

“Q. You were present, were you not, on June 11th in Judge Hall's courtroom, on Saturday morning, when he made an order that you answer certain questions? The government contends, contended at that time and now contends that those questions asked of you would not incriminate you, but in order that we may allay any suspicion or fear that you may have in your mind that you may be prosecuted should you answer any of those questions, prosecuted for a Federal offense.

(Testimony of E. L. Drummond.)

(Statement By Elvador Claude Greenfield.)

“We are prepared in behalf of the government to [43] offer you the broadest possible immunity we could offer you. That is, I as United States Attorney, Mr. Max Goldschein as a Special Assistant to the Attorney General, and acting under the authority of the Attorney General, we offer and promise you that if you accept this proposal and testify that nothing you say will or can be used against you in a criminal proceeding in Federal Courts, nor will any leads growing out of any testimony that you may give be used against you in any prosecution in the Federal Courts.

“That, in other words, is an offer or proposal of immunity in the broadest possible terms that I can state them.

“Now, do you accept that proposal?

“A. Well, I have been given to understand that you have no authority to give me immunity in any of these things, and that I may be prosecuted by another court or another body that wished to bring forward any indictment based upon anything that I might have said.

“Q. Well, it is true, Mr. Greenfield, there is no express statute covering this matter, but for centuries prosecutors under the English common law system have made offers and grants of immunity to [44] witnesses, and courts have upheld witnesses in relying upon those offers.

“Do you understand that any Federal Court

(Testimony of E. L. Drummond.)

(Statement By Elvador Claude Greenfield.)

would consider it unfair and inequitable and unjust, if you accepted that proposal, to thereafter entertain a criminal prosecution for violation of Federal law against you?

“A. Under the circumstances I could not accept the immunity as valid.

“Q. We ask you now the questions seriatim that Judge Hall ordered you to answer, referring to page 39 of the court Transcript of May 26th.

“No. 1: Now, do you know who has the books and records of the Los Angeles County Communist Party?

“A. I will have to give the same answer I did before, on the ground that it may incriminate me.

“Q. You were asked if you knew Dorothy Healey, and then the question which I will term No. 2 was this question: Was that the first time you ever saw her?

“A. I refuse to answer on the ground that it may incriminate me.

“Q. 3: Does she have the books and records of the Los Angeles County Communist Party, do you know?

“A. I refuse to answer that on the ground that it may incriminate me.

“Q. 4: Do you know who has the books and records of the Los Angeles County Communist Party?

“A. I refuse to answer on the ground it may incriminate me.

(Testimony of E. L. Drummond.)

(Statement By Elvador Claude Greenfield.)

“Q. 5: Mr. Greenfield, do you know whether or not the Los Angeles County Communist Party is divided up into divisions?

“A. I refuse to answer on the grounds it may incriminate me.

“Q. 6: Can you tell us how many divisions there are?

“A. I refuse to answer that on the ground it may incriminate me.

“Q. 7: Can you tell us whether or not each division of the Communist Party of Los Angeles County keeps books of the membership of that division?

“A. I refuse to answer on the same ground, that it may incriminate me.

“Q. 8: Can you tell us the names of the chairmen or organizers of these divisions?

“A. I refuse to answer on the ground it may incriminate me.

“Q. 9: Can you tell us whether or not those divisions each have a membership or social director? [46]

“A. I refuse to answer on the ground it may incriminate me.

“Q. 10: Mr. Greenfield, we want to know the names of those people who hold these offices.

“A. I refuse to answer on the ground it may incriminate me.

“Q. No. 11: Well, does each division have a



(Testimony of E. L. Drummond.)

(Statement By Elvador Claude Greenfield.)

financial director? If so, will you give us their names?

“A. I refuse to answer on the grounds it may incriminate me.

“Q. 12: Mr. Greenfield, I believe I asked you this morning whether or not you knew who had the books and records of the Communist Party. Will you answer that question?

“A. That was one of the duplicates he said I didn't have to answer.

“Q. That was a duplicate of a question which preceded it, which one you refused to answer.

“A. He didn't order me to.

“Mr. Carter: All right. You will be recessed, Mr. Greenfield. Will you wait outside in the ante-room?

“The Witness: Okay.”

Q. Were there any other questions asked?

A. No, sir. [47]

The Court: Cross-examine.

Mr. Margolis: No questions.

The Court: The next is No. 20746, United States v. Dorothy Ray Healey.

### E. L. DRUMMOND

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

(Testimony of E. L. Drummond.)

The Witness: E. L. Drummond.

The Clerk: Take the stand.

Direct Examination

By Mr. Goldschein:

Q. This is Mr. E. L. Drummond?

A. Yes, sir.

Q. Mr. Drummond, you are the official grand jury reporter for the United States District Court for the Southern District of California?

A. I am one of them.

Q. Were you before the grand jury on June 14, 1949, when Dorothy Ray Healey was recalled as a witness?

A. I was.

Q. Did you take down on that day the questions that she was asked and the answers she gave in shorthand?

A. I did.

Q. Did you properly transcribe them? [48]

A. I did.

Q. Now were you sworn as the official court reporter?

A. I was.

Q. Mr. Drummond, can you identify this transcript as the transcript of the questions asked and the answers she gave that you transcribed?

The Court: On June 14?

Q. (By Mr. Goldschein): On June 14, 1949?

A. (Examining document): It is.

Q. Will you read the questions asked her and the answers that she gave, please, sir?

A. Yes, sir.

(Testimony of E. L. Drummond.)

“DOROTHY RAY HEALEY

recalled as a witness before the grand jury, having been previously duly sworn by the Foreman, was examined and testified as follows:

“Examination

“By Mr. Goldschein:

“Q. (Mrs. Dorothy Ray Healey recalled): Mrs. Healey, you have with reference to a great many questions asked you before this grand jury claimed that the answers that you would give might tend to incriminate you for the violation of a Federal offense. That is so, isn't it? [49]

“A. I think the record states as to why I refused to answer, Mr. Goldschein.

“Q. Now, in order to ease your mind with reference to any fear that you may have about incriminating yourself for the violation of a Federal offense, we want to advise you now so that you may testify freely without any such fear that the Federal Government will not prosecute you as the result of any information that you might give this grand jury or any leads that might be developed from any information that you give this grand jury.

“Now, with that assurance, which is of record here, do you feel free now——

“Mr. Carter: Let me go further, Mr. Goldschein. In the ordinary language of the layman, what Mr. Goldschein has stated is that the Federal

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

Government, through myself as United States Attorney and acting on authority of the Attorney General of the United States, are promising you, offering you immunity in the broadest possible terms, immunity from any Federal prosecution that would grow out of either your direct testimony or indirectly out of it, that is, a possible prosecution even based upon leads supplied by your testimony.

“In other words, we offer you immunity from Federal prosecution in the broadest possible language that we can offer. When I say ‘we,’ I refer to the United States Government acting through me as United States Attorney, Max Goldschein, Special Assistant to the Attorney General, and acting upon the authority of the Attorney General.

“The Witness: Is there a time period on that, Mr. Carter?

“Mr. Carter: There is no time period on it.

“The Witness: In other words, what you are stating is that the government has said to me that there would not be prosecution of me under the Smith Act or any section of the Smith Act on the basis of any testimony to be given before the grand jury?

“Mr. Carter: Stating that there would be no prosecution against you growing out of any evidence that you may supply. We are not going to categorically enumerate statutes. You might subsequently become involved in a narcotics case, and if the government made the narcotics case against

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

you and testimony indicates that you have been involved in that narcotics case, you might be prosecuted, but nothing you have said before this grand jury could be used against you in any prosecution that would be filed against you hereafter. [51]

“The Witness: Before I answer Mr. Goldscheine’s question, and it is a question of my answering it, I would like to consult with my attorney, inasmuch as this is certainly a new approach on the part of the government.

“Mr. Goldscheine: You may.

“The Witness: Thank you.

“(Witness leaves the room and returns.)

“The Witness: My attorney advises me that you have no power to make such a guarantee, and therefore I will have to stand on my previous answers.

“Q. (By Mr. Carter): Let me go a step further, then, in explaining this. There is a well-recognized principle of law that the government can’t in good faith, good conscience and equity, make that kind of a proposal and thereby induce you or secure or compel your testimony, and thereafter ever use that testimony against you, and regardless of what your attorney has advised you, I would advise for the record and publicly that in view of that statement made to you you could not be prosecuted for a Federal offense.

“A. Well, you will excuse me, Mr. Carter, if I sound a little personal, but I think you and the



(Testimony of E. L. Drummond.)

. (Statement By Dorothy Ray Healey.)

grand jury would agree with me that I can't be too much influenced by your protestations on this question, [52] inasmuch as for some time now the record would indicate that although ostensibly this grand jury is conducting an investigation of federal employees, actually again I say the record will show clearer than anything else the activity of the grand jury has been used for entirely different purposes.

“Q. (By Mr. Goldschein): That is a conclusion on your part.

“A. Certainly I can give my own opinion of it, and I have that opinion very strongly and deeply. Mr. Carter says that very eloquently, and his actions have been something else entirely. I hope that Mr. Carter and you will excuse me if I am not impressed by your statement now.

“Q. We are not asking you to be impressed, but telling you as a matter of law that the Federal Government by its representatives cannot induce you to make a statement on the premise that you will not be prosecuted for making this statement, and then attempt to prosecute you after you make them. The courts won't permit any such thing to happen, and the government would have no idea of doing it.

“Now, what I say now to you is of record, the court reporter is present and taking it down.

“A. I am not a lawyer. I am a layman. [53]

“Q. The one question——

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.) .

“A. But I have discovered in this listening and sitting in court on this that law is subject to interpretation, and therefore you are giving me your interpretation. You will certainly excuse me if I take my own counsel’s interpretation.

“Q. I would like to advise you that we are not interested in your conclusions at all. The only thing we are interested in is offering you this privilege, if you want it. If you don’t want it, nobody is attempting to coerce you or force you. There was an offer made. You were given the opportunity to consult with your counsel. You decide that you do not want to accept it.

“A. That is correct.

“Mr. Goldschein: That ends it.

“Q. (By Mr. Carter): So the record will be clear, Mrs. Healey, I understand that although you fully understand what Mr. Goldschein and I have stated to you, that after consultation with your lawyer you again decline to answer the question previously asked you upon the ground that you might incriminate yourself, is that right?

“A. Well, let me state this, that you say the questions previously asked me—— [54]

“Q. You have been ordered by the court to answer certain questions. It is our purpose, this is again pursuant to the court order, to put again to you one by one the questions which the court ordered you to answer. You are familiar with what those questions are?           A. Right.

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

“Q. Those are the questions I refer to when I say am I right in understanding you are going to decline to answer those questions on the ground that you might incriminate yourself, rather than avail yourself of our promise to you?

“A. I would prefer to answer each individual question, Mr. Carter, alone.

“Q. (By Mr. Goldschein): The first question, Mrs. Healey, is: Will you tell us who you are organizer for? You previously stated you were an organizer.

“A. I decline to answer that question on the grounds previously stated.

“Q. The second question the court ordered you to answer is this: Now, Mrs. Healey, do you know who has the books and records of the Los Angeles County Communist Party?

“A. Same answer.

“Q. The third question is: Can you tell us, Mrs. [55] Healey, whether or not the Los Angeles County Communist Party has a chairman?

“A. Same answer.

“Q. The fourth question is: Can you tell us whether or not it has an organizational secretary?

“A. Same answer.

“Q. Can you tell us whether or not it has an educational director?                   A. Same answer.

“Q. Can you tell us whether or not it has a labor director?                   A. Same answer.

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

“Q. Can you tell us whether or not the membership or social director would have a list of the members of the Los Angeles County Communist Party? A. Same answer.

“Q. No. 8, can you tell us whether or not they have a financial director? A. Same answer.

“Q. No. 9, can you tell us whether or not the financial director would have a record of the dues paid by the members of the Los Angeles County Communist Party? A. Same answer.

“Q. The 10th question: Can you tell us who has [56] the records showing the dues paid by the membership of the Los Angeles County Communist Party? A. Same answer.

“Q. Now, No. 11: Now, Mrs. Healey, can you tell us the name of anyone who can give us that information I just asked you?

“A. Same answer.

“Q. 12th: But that information is available, is it not? A. Same answer.

“Q. 13th: Can you tell us how many divisions there are in the Los Angeles or the Los Angeles County Communist Party? A. Same answer.

“Q. 14: Can you tell us how many sections there are in the divisions? A. Same answer.

“Q. 15: Can you tell us how many clubs there are? A. Same answer.

“Q. Can you tell us how many squads there are?

“A. Same answer.

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

“Q. 17: Mrs. Healey, can you tell us who is chairman of the eastern division of the Los Angeles County Communist Party? [57]

“A. Same answer.

“Q. 18: Can you tell us who is the chairman of the midtown division of the Los Angeles County Communist Party? A. Same answer.

“Q. 19: Can you tell us who is the head of the southern division of the Los Angeles County Communist Party?

“A. Same answer. Excuse me, Mr. Goldschein. The air-conditioning is getting me. I wonder if I could be excused to get my jacket.

“Q. Yes.

“(Witness leaves the room and returns.)

“Q. (By Mr. Goldschein): No. 20: Can you tell us who is the head of the western division of the Los Angeles County Communist Party?

“A. Same answer.

“Q. 21: Can you tell us who is the head of the youth division of the Los Angeles County Communist Party? A. Same answer.

“Q. Can you tell us who is the head of the student section of that youth division? That is No. 22.

“A. Same answer. [58]

“Q. 23: Mrs. Healey, each division has a chairman, does it not? A. Same answer.

“Q. 24: Or sometimes called an organizer.

“A. Same answer.



(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

“Q. 25: Does each division have an organizational secretary? A. Same answer.

“Q. 26: Does each have a membership or social secretary? A. Same answer.

“Q. 27: Does each have a membership or social director? A. Same answer.

“Q. 28: Does the membership or social director of each division have a list of the membership of that division? A. Same answer.

“Q. 29: Does each division have a financial director? A. Same answer.

“Q. 30: Do not the membership director and the financial director have the books and records of the Los Angeles County Communist Party?

“A. Same answer. [59]

“Q. 31: Will you tell us who has the books and records of the Los Angeles County Communist Party? A. Same answer.

“Q. 32: Now, that statement with reference to Mrs. Dorothy Ray Healey, the organizational secretary of the Los Angeles Communist Party, is that designation correct with reference to you?

“A. Same answer.

“Q. Mrs. Healey, you know what that refers to. That refers to an article in the People's World of April 28, 1949, that I read to you when you were before the grand jury here.

“A. I remember that.

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

“Q. On a prior occasion. No. 33: What is your business address? A. Same answer.

“Q. 34: You are in charge of those records, are you not? That question pertains to the Los Angeles County Communist Party records.

“A. On June 11, 1949, I was served with two subpoenas duces tecum directing the production of the following records: 1, the books and records of the membership in the Communist Party of Los Angeles and Los Angeles Committee of the Communist Party; 2, books and records showing dues paid by members of the Communist [60] Party of Los Angeles and the Los Angeles Committee of the Communist Party; 3, mimeographed questionnaire sheets filled out by members of the Communist Party of Los Angeles and the Los Angeles Committee of the Communist Party.

“I am unable to produce any membership records of the Communist Party of Los Angeles or of the Los Angeles Committee of the Communist Party, or any of the records asked for in the subpoena duces tecum, because I do not have possession, control or custody or access to any such records.

“As a matter of fact, I do not know of the existence of any records concerning which you have questioned me or any records described in the subpoena duces tecum to which I referred, or of any records whatsoever showing the names of members of the Communist Party of Los Angeles or of the Los Angeles Committee of the Communist Party.

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

“Q. Who is in charge of the records of the Los Angeles County Communist Party?

“A. I decline to answer on the grounds previously stated.

“Q. Are these records in the place of business where you work? A. Same answer. [61]

“Mr. Carter: That is No. 35.

“Q. (By Mr. Goldschein): No. 36. Do you know who does have control over the records?

“A. Same answer.

“Q. (By Mr. Carter): Mrs. Healey, did you bring some papers or records with you when you came to the grand jury room this morning?

“A. I think I answered that question by the previous answer.

“Q. I am asking you if you brought some papers with you when you came to the grand jury room.

“A. Newspapers. Are you referring to what I was holding out there? Just newspapers.

“Q. Did you bring any records of any kind with you when you came in the Federal Building this morning? A. No, I did not.

“Q. (By Mr. Goldschein): Mrs. Healey, will you look at this government Exhibit No. 3, marked 6-10-49, marked In Re Healey, et al., June 10, 1949, No. 3 for identification, and under it No. 3 in evidence, signed by the Deputy Clerk, and see whether or not you recognize it as the signature card at the Security-First National Bank of Los Angeles with

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

the name Dorothy Ray Healey underneath? Do you see the card?

“A. Before I answer that question I would like to consult with my attorney.

“Q. Well, do you see the card?

“A. Certainly.

“Q. All right. Now, you consult with your attorney. A. Thank you.

“(Witness leaves room and returns.)

“Q. (By Mr. Goldscheine): Let me read into the record what this card shows, so that we won't have to repeat. Do you want to watch me as I read it? A. Not particularly.

“Q. I mean watch and read the card with me, to see that I read it accurately into the record. I don't mean watch me. This is headed, 'Security-First National Bank of Los Angeles,' dated 8-7-47:

“‘At a meeting of the Los Angeles County Committee of the Communist Party tax account, held on July 19, 1947, N. Sparks and/or Dorothy Ray Healey and Barbara Moreley, whose signatures are given on the reverse side of this card, were authorized, any two of them acting together, to execute checks and other items payable to this Committee; further, that this Committee agrees to the conditions propounded [63] in the bank book issued on Connection with this account with the Security-First National Bank of Los Angeles as to all de-

(Testimony of E. L. Drummond.)

(Statement By Dorothy Ray Healey.)

posits and withdrawals made on that account and to other transactions with said bank.

“ ‘/s/ N. S. SPARKS,

“ ‘President

“ ‘DOROTHY RAY HEALEY

“ ‘Secretary’

“Now, I believe I asked you whether or not that is your signature.       A. You did.

“Q. And your answer?

“A. Was the same answer I have given before.

“Q. Do you know the signature of N. Sparks?

“A. Same answer.

“Q. Will you tell us whether or not that is the signature of N. Sparks?       A. Same answer.

“Mr. Goldschein: All right, thank you, Mrs. Healey. Will you wait outside, please?”

Q. Is that all the questions that were asked Mrs. Healey and all the answers she gave?

A. It is.

Mr. Goldschein: Cross examine.

Mr. Margolis: No cross-examination. [64]

The Court: No. 20747, United States vs. Horace Morton Newman, Jr.



E. L. DRUMMOND

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: E. L. Drummond.

The Clerk: Be seated.

Direct Examination

By Mr. Goldschein:

Q. This is Mr. E. L. Drummond?

A. Yes, sir.

Q. Mr. Drummond, you are the official grand jury reporter for the United States District Court for the Southern District of California?

A. I am one of them.

Q. On June 14, 1949, did you appear before the United States district grand jury?

A. I did.

Q. And were you present on June 14, 1949, when Mr. Horace Morton Newman, Jr., appeared before the grand jury?

A. Yes, sir.

Q. Did you on that date take down in shorthand and transcribe all the questions asked him and the answers that he gave? [65]

A. I did.

Q. Will you examine this transcript—were you sworn to take down accurately and transcribe this testimony before the grand jury?

A. I was.

Q. Will you examine this transcript, dated June 14, 1949, and tell us whether or not those were the questions asked of Mr. Newman and the answers he gave on that day?

(Testimony of E. L. Drummond.)

A. (Examining document) They are.

Q. Will you read that transcript, please?

A. Yes, sir.

“Examination

“By Mr. Carter:

“(Mr. Horace Morton Newman, Jr., recalled.)

“Q. Mr. Newman, you have previously been before this grand jury and have been asked questions that you declined to answer. A. Yes.

“Q. You were present in Judge Hall’s court on June 9, 10, and 11, Thursday, Friday and Saturday of last week, and on Saturday, June 11, Judge Hall made an order that you answer certain questions. You are familiar with that order?

“A. Yes, sir.

“Q. Mr. Newman, so that you may have no fear [66] of any possible prosecution under Federal law, the Federal Government, the United States Government is now prepared, acting through myself as United States Attorney, Mr. Max Goldscheim, as Special Assistant to the Attorney General, and by the authority of the Attorney General, to offer you immunity from any Federal prosecution in the broadest possible language.

“In other words, we offer and promise you in behalf of the Federal Government that you will not be prosecuted based upon any testimony that you give before this grand jury.

“In the language of the layman, that is an offer of immunity by the Federal prosecutor and from

(Testimony of E. L. Drummond.)

(Statement of Horace Morton Newman, Jr.)  
the Federal Government, stated in the broadest possible terms that I can state that.

“Do you understand what I have said to you?

“A. I understand it, yes.

“Q. Now in view of that statement that I have just made I would like to ask you these questions that you have been ordered to answer and see if we can't get you to answer them.

“Referring to, for the purpose of the record, page 67 of the court transcript of May 26, question No. 1: Do you know Dorothy Healey? [67]

“A. I am going to decline to answer that on the ground that to answer it might incriminate me.

“Q. And you are declining notwithstanding the fact that you fully understand the statement that I have just made to you?

“A. That is right. I am not changing my position.

“Q. No. 2: Do you know her office address?

“A. The same answer.

“Q. 3: Do you know her business or occupation?

“A. The same answer.

“Q. 5: Who are you educational director for?

“A. The same answer.

“Q. 6: Do you know who the financial director is for the eastern division of the Los Angeles County Communist Party?

“A. The same answer.

“Q. 7: Do you know who the membership or

(Testimony of E. L. Drummond.)

(Statement of Horace Morton Newman, Jr.)

social director is of the eastern division of the Los Angeles County Communist Party?

"A. The same answer.

"Q. No. 8: Now, who is the chairman of the Los Angeles County Communist Party?

"A. The same answer.

"Q. 9: Who is the organizational secretary of the Los Angeles County Communist Party?

"A. The same answer.

"Q. 10: Now, do you know whether or not the Los Angeles County Communist Party has a labor director? A. The same answer.

"Q. 10-A: Do you know whether or not they have a membership or social director?

"A. The same answer.

"Q. 11: Do you know whether or not the membership or social director has a list of the membership of the Los Angeles County Communist Party?

"A. The same answer.

"Q. 12: Do you know whether or not the Los Angeles County Communist Party has a financial director? A. The same answer.

"Q. 13: Do you know whether or not the financial director keeps an account of the dues collected from members of the Los Angeles County Communist Party? A. The same answer.

"Q. 14: Do you report to anybody who you see? Now, before you answer that, that question was asked in connection with your activities in your

(Testimony of E. L. Drummond.)

(Statement of Horace Morton Newman, Jr.)

business and your appointments and so forth. [69]

“Do you report to anyone who you see?

“A. The same answer.

“Q. 15: Do you know Dorothy Healey is the organizational secretary of the Communist Party of Los Angeles County? A. The same answer.

“Q. 16: Do you know whether Dorothy Healey has in her possession or under her control any books and records of the Communist Party of Los Angeles County? A. The same answer.

“Mr. Carter: You will be recessed at this time, Mr. Newman. Will you wait outside?

“The Witness: I will.”

Q. Were any other questions asked Mr. Newman or any other answers given by him?

A. No, sir.

The Court: Cross examine.

Mr. Margolis: None, your Honor.

Mr. Carter: You may step down, Mr. Drummond.

(Witness excused.)

The Court: Next witness.

Mr. Goldschein: That is all, may it please the court, except that we want to incorporate by reference the previous hearings of the grand jury and hearings of the court in this [70] matter.

The Court: They have not yet been transcribed?

Mr. Goldschein: Some of them haven't been transcribed.

The Court: The court will take judicial notice



of two things: First, that the grand jury has not been discharged and that there was an order made continuing it and, secondly, the court will take judicial notice of the proceedings before the court in connection with each of these witnesses on each of these matters, and that the order was made directing them to be and appear before the grand jury on June 14 to give answer to these questions—whether or not there were others I do not recall, but at least to these questions on that date—which is, in effect, to incorporate into the government's case all of the previous proceedings in connection with these witnesses.

Mr. Goldschein: Yes, sir.

The Court: Very well. The government rests?

Mr. Goldschein: The government rests.

Mr. Margolis: I just wonder if I might ask through the court if the government has forgotten any witnesses at this time.

Mr. Goldschein: Well, something may develop. We don't know at this time. We have no witnesses at the present. It may be necessary to call some others, however.

Mr. Margolis: I think if the government has any other [71] witnesses they should call them now before they close their case, your Honor.

The Court: The government has rested.

Mr. Margolis: If your Honor please, it is my understanding that we proceed in this manner with

the five cases following each other so that a single showing might be made on behalf of each of these different defendants. Am I correct in that, your Honor?

The Court: If that is your desire.

Mr. Margolis: That is my desire.

The Court: Is there any objection to that?

Mr. Goldschein: No objection.

The Court: Very well. That is the way the matter will be considered. In other words, everything that is offered defensively will be considered as having been offered separately as to each one of the witnesses and as to each question and as to each single objection.

Mr. Margolis: Thank you, your Honor.

Now, if your Honor please, in order to shorten the proceeding, and following the practice heretofore had, I would like to have considered as part of this record the showing made by the then respondents, now defendants, in connection with the proceedings to which counsel for the government has referred and in which proceedings the government asked for a direction to the witnesses to answer these questions and in [72] such direction an order was issued by this court, those proceedings having taken place I believe on the 14th of this month.

The Court: There were various dates in connection with the several witnesses. I think as to New-

man there was April 21, 1949, May 26, 1949, June 9, 1949 and June 11, 1949.

I understand your proposal is, and I thought that I had made the order broad enough in connection with the government's offer, that all previous proceedings had in connection with any of these witnesses before this court are deemed to be in evidence and I take judicial notice of them.

Mr. Margolis: I see. That includes defensive material as well and includes offers of proof and all of that?

The Court: I put in everything.

Mr. Margolis: The same rulings would have been made in this case, and so forth?

The Court: That is right. Now I will make the same order in so far as the defendants are concerned. If the order I have made as far as the government is concerned is not broad enough it will be broadened to include every fact, thing, statement, argument, case heretofore offered in connection with these proceedings on behalf of any of these defendants in objection and in opposition to the proposed order of the government heretofore made, to the same force and effect as if herein again *ad extenso in haec verba* repeated.

Mr. Margolis: That will considerably shorten our showing, your Honor.

We have a few additional matters that we want to

present. I have handed counsel a document to examine.

The Court: Very well.

Mr. Goldschein: Of course we are not in position to read this document. We know what the first case says.

The Court: You may have a few minutes recess in which to read it.

(Short recess.)

The Court: The record will show the defendants are present in person and by counsel.

There was some document you were looking at. Have you had an opportunity to read it, Mr. Goldschein?

Mr. Goldschein: No, sir, I haven't, may it please the court. It is a document containing 29 pages. I have looked through it. It purports to be a report of the Committee on Un-American Activities at the United States House of Representatives on "100 Things You Should Know about Communism in the U. S. A." I don't know what purpose it is offered for. It certainly has no bearing, as I see it, to the issues involved here.

The Court: Do you want to mark it for identification? Are you going to use it in argument? It being a public record I suppose I can take judicial notice of it, as well as [74] of all the proceedings that go on before the various committees of Congress and the proceedings of Congress itself.

Mr. Margolis: Yes.

Your Honor, I would like to state the purpose of this, in view of the fact that counsel has asked the question. I have here a document entitled "100 Things You Should Know about Communism in the U. S. A.," prepared and released by the Committee on Un-American Activities, U. S. House of Representatives, Washington, D. C., and printed by the Government Printing Office.

This is a document of which, as your Honor has indicated, your Honor could take judicial notice. However, I would like to have it marked either for identification—after I state the purpose of it—or in evidence, merely so that your Honor will have before you the matter which you are entitled to take judicial notice of.

The Court: It will be marked for identification as Exhibit A in No. 20743—well, perhaps in order to keep the record entirely straight in connection with these matters, counsel would have no objection if an order were now made consolidating all of these matters for trial.

Mr. Margolis: I have no objection.

The Court: And it may be deemed that that order shall be deemed to have been made at the commencement of the proceedings this morning?

Mr. Margolis: It may be so deemed, as far as the defendants are concerned.

The Court: Is there any objection on the part of the government?



Mr. Goldschein: Sir?

The Court: I suggested that an order be made now and deemed to have been made at the commencement of the proceedings that all of these cases be consolidated for trial.

Mr. Goldschein: That is satisfactory. There is no objection to that.

The Court: Very well. So ordered.

This then will take Exhibit A for identification in the consolidated cases.

(The document referred to was marked Defendants' Exhibit A for identification.)



# COMMUNISM IN THE U.S.A.

*The first of a series on the Communist conspiracy and its influence  
in this country as a whole, on religion, on education,  
on labor and on our government*



Prepared and released by the

COMMITTEE ON UN-AMERICAN ACTIVITIES, U. S. HOUSE OF REPRESENTATIVES  
WASHINGTON, D. C.

*Committee on Un-American Activities*  
*U. S. House of Representatives*



J. Parnell Thomas, New Jersey, *Chairman*

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John E. Rankin, *Mississippi*

J. Hardin Peterson, *Florida*

F. Edward Hébert, *Louisiana*



Robert E. Stripling, *Chief Investigator*

Benjamin Mandel, *Director of Research*

# 100 Things You Should Know About Communism in the U. S. A.

Forty years ago, Communism was just a plot in the minds of a very few peculiar people.

Today, Communism is a world force governing millions of the human race and threatening to govern all of it.

*Who are the Communists? How do they work? What do they want? What would they do to you?*

For the past 10 years your committee has studied these and other questions and now some positive answers can be made.

Some answers will shock the citizen who has not examined Communism closely. Most answers will infuriate the Communists.

These answers are given in five booklets, as follows:

1. One Hundred Things You Should Know About Communism in the U. S. A.
2. One Hundred Things You Should Know About Communism in Religion.
3. One Hundred Things You Should Know About Communism in Education.
4. One Hundred Things You Should Know About Communism in Labor.
5. One Hundred Things You Should Know About Communism in Government.

These booklets are intended to help you know a Communist when you hear him speak and when you see him work.

If you ever find yourself in open debate with a Communist the facts here given can be used to destroy his arguments completely and expose him as he is for all to see.

Every citizen owes himself and his family the truth about Communism because the world today is faced with a single choice: To go Communist or not to go Communist. Here are the facts.

## 1. *What is Communism?*

A system by which one small group seeks to rule the world.



*2. Has any nation ever gone Communist in a free election?*

No.

*3. Then how do the Communists try to get control?*

Legally or illegally, any way they can. Communism's first big victory was through bloody revolution. Every one since has been by military conquest, or internal corruption, or the threat of these.

CONSPIRACY is the basic method of Communism in countries it is trying to capture.

IRON FORCE is the basic method of Communism in countries it has already captured.

*4. What would happen if Communism should come into power in this country?*

Our capital would move from Washington to Moscow. Every man, woman, and child would come under Communist discipline.

*5. Would I be better off than I am now?*

No. And the next 17 answers show why.

*6. Could I belong to a union?*

Under Communism, all labor unions are run by the Government and the Communists run the Government. Unions couldn't help you get higher pay, shorter hours or better working conditions.

*They would only be used by the Communists to help keep you down.*

More complete details are given in ONE HUNDRED THINGS YOU SHOULD KNOW ABOUT COMMUNISM IN LABOR.

*7. Could I change my job?*

No, you would work where you are told, at what you are told, for wages fixed by the Government.

*8. Could I go to school?*

You could go to the kind of school the Communists tell you to, AND NOWHERE ELSE. You could go as long as they let you AND NO LONGER.

You could read ONLY what the Communists let you; hear only what they let you, and as far as they could manage, you would KNOW only what they let you.

For details, see ONE HUNDRED THINGS YOU SHOULD KNOW ABOUT COMMUNISM IN EDUCATION.

*9. Could I belong to the Elks, Rotary, or the American Legion?*

No. William Z. Foster, the head of the Communists in the United States, says:

Under the dictatorship all the capitalist parties—Republican, Democratic, Progressive, Socialist, etc.—will be liquidated, the Communist Party functioning alone as the Party of the toiling masses.

Likewise will be dissolved, all other organizations that are political props of the bourgeois rule, including chambers of commerce, employers' associations, Rotary Clubs, American Legion, YMCA, and such fraternal orders as the Masons, Odd Fellows, Elks, Knights of Columbus, etc.

*10. Could I own my own farm?*

No. Under Communism, the land is the property of the Government, and the Government is run by the Communists.

You would farm the land under orders and you could not make any decisions as to when or where you would sell the produce of your work, or for how much.

*11. Could I own my own home?*

No. Under Communism, all real estate in the city as well as the country belongs to the government, which is in turn run by the Communists.

Your living quarters would be assigned to you, and you would pay rent as ordered.

*12. What would happen to my insurance?*

The Communists would take it over.

*13. What would happen to my bank account?*

All above a small sum would be confiscated. The rest would be controlled for you.

*14. Could I leave any property to my family when I die?*

No, because you wouldn't have any to leave.

*15. Could I travel around the country as I please?*

No. You would have to get police permission for every move you make, if you could get it.

*16. Could I belong to a church?*

In Russia, the Communists have for thirty years tried every way they could to destroy religion.

Having failed that, they are now trying to USE religion from the inside and the same Party strategy is *now operating in the United States of America.*

See ONE HUNDRED THINGS YOU SHOULD KNOW ABOUT COMMUNISM IN RELIGION.

*17. Could I start up a business and hire people to work for me?*

To do so would be a crime for which you would be severely punished.

*18. Could I teach what I please with "academic freedom"?*

You would teach only what the Communists authorize you to teach.

You would be asking for jail or death to try anything else.

*19. Could I do scientific research free of governmental interference and restrictions?*

Police and spies would watch your every move. You would be liquidated on the slightest suspicion of doing ANYTHING contrary to orders.

*20. Could I have friends of my own choice as I do now?*

No, except those approved by the Communists in charge of your life from cradle to grave.

*21. Could I travel abroad or marry a foreigner?*

You could do nothing of that sort except with permission of the Communists.

*22. Could I exchange letters with friends in other countries?*

With the police reading your mail, you could try—once.

*23. Could I vote the Communists out of control?*

No. See ONE HUNDRED THINGS YOU SHOULD KNOW ABOUT COMMUNISM IN GOVERNMENT, showing the facts.

of Communist government in other countries and the facts of Communism at work within OUR OWN government.

*24. But doesn't Communism promise poor people a better life?*

Communist politicians all over the world try in every way to break down nations as they are, hoping that in the confusion they will be able to seize control.

*Promising more than you can deliver is an old trick in the history of the human race.*

Compare Communism's promises with Communism's performances in countries where it has come to power.

*25. What are some differences between Communist promise and Communist performance?*

When it is agitating for power, Communism promises more money for less work and security against war and poverty.

In practice, it has not delivered any of this, anywhere in the world.

*26. But don't the Communists promise an end to racial and religious intolerance?*

Yes, but in practice they have murdered millions for being religious and for belonging to a particular class. Your race would be no help to you under Communism.

Your beliefs could get you killed.

*27. Why shouldn't I turn Communist?*

You know what the United States is like today. If you want it exactly the opposite, you *should* turn Communist.

But before you do, remember you will lose your independence, your property, and your freedom of mind.

You will gain only a risky membership in a conspiracy which is ruthless, godless, and crushing upon all except a very few at the top.

*28. How many Communists are there in the world?*

There are 20,000,000 Communists, more or less, in a world of 2,295,125,000 people. In other words, about one person in 115 is a Communist, on a world basis.



*29. How many people are now ruled by Communism?*

About 200,000,000 directly; 200,000,000 more indirectly, and an additional 250,000,000 are under daily Communist pressure to surrender.

*30. Which countries are Communist controlled or governed?*

Albania, Bulgaria, Czechoslovakia, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Romania, Russia, Yugoslavia.

Important regions of Austria, Germany, Korea, Mongolia and Manchuria.

Communism is concentrating now on immediate capture of Afghanistan, China, France, Greece, Latin America, Iran and Palestine.

It has plans to seize every other country including the United States.

*31. How many Communists are there in the United States?*

There are approximately 80,000 out of a population of 145,340,000 people. J. Edgar Hoover has testified that "in 1917 when the Communists overthrew the Russian Government there was one Communist for every 2,277 persons in Russia. In the United States today there is one Communist for every 1,814 persons in the country."

*32. Why aren't there more?*

Because the Communist Party does not rely upon actual Party membership for its strength. J. Edgar Hoover testified:

"What is important is the claim of the Communists themselves that for every Party member there are ten others ready, willing, and able to do the Party's work. Herein lies the greatest menace of Communism.

"For these are the people who infiltrate and corrupt various spheres of American life. So rather than the size of the Communist Party the way to weigh its true importance is by testing its influence, its ability to infiltrate."

*33. How are they organized?*

Primarily around something they call a political party, behind which they operate a carefully trained force of spies, revolutionaries, and conspirators.

The basic fact to remember is that Communism is a world revolutionary movement and Communists are disciplined agents, operating under a plan of war.



*34. Where are their headquarters in the United States, and who is in charge?*

Headquarters are at 35 East Twelfth Street, New York City. William Z. Foster, of 1040 Melton Avenue, New York City, has the title of "Chairman of the Communist Party of the United States," but Foster is actually just a figurehead under control of foreign operatives unseen by and unknown to rank and file Communists.

*35. What is the emblem of the Communist Party in the United States?*

The hammer and sickle.

*36. What is the emblem of the Communist Party in the Soviet Union?*

The hammer and sickle.

It is also the official emblem of the Soviet Government.

*37. What is the flag of the Communist Party in the United States?*

The *red* flag, the same as that of all Communist Parties of the world.

*38. What is the official song of the Communist Party of the United States?*

*The Internationale.* Here is the Chorus:

*'Tis the final conflict,  
Let each stand in his place;  
The International Soviet shall be the human race.*

*39. Do the Communists pledge allegiance to the flag of the United States?*

The present head of the Communists in the United States has testified under oath that they DO NOT.

*40. What is the Communist Party set-up?*

At the bottom level are "shop and street units" composed of three or more Communists in a single factory, office, or neighborhood.

Next is the section which includes all units in a given area of a city. Then come districts, composed of one or more States.

At the top is the national organization, composed of a national committee and a number of commissions.

In the appendix of this pamphlet you will find listed the officers and address for each district of the Communist Party in the United States.

*41. Who can become a member of the Communist Party of the United States?*

Anybody over 17 years of age who can convince the Party that his first loyalty will be to the Soviet Union and that he is able to do the Party's work as a Soviet agent.

He must be an active member of a Party unit. He must obey ALL Party decisions. He must read the Party literature. He must pay dues regularly.

*42. How do you go about joining the Party?*

You must know some member in good standing who will vouch for you to his Party unit. Your acceptance still depends on the verdict of Party officials that you WILL AND CAN obey orders.

*43. Can you be a secret member?*

All Communists are secret members until authorized by the Party to reveal their connection. Party membership records are kept in code. Communists have a real name and a "Party name."

*44. Are meetings public like those of ordinary political parties?*

No, meetings are secret and at secret addresses. Records are all secret and in code. Public demonstrations are held at regular periods.

*45. What dues do you have to pay?*

They are adjusted according to income. They may range from as low as 2 cents a week to \$15 a week with special assessments in addition.

*46. What do you have to promise?*

To carry out Communist Party orders promptly. To submit without question to Party decisions and discipline.

To work for "The triumph of Soviet power in the United States."

*47. After you join, what do you have to do?*

You have to obey the Party in all things. It may tell you to change your home, your job, your husband, or wife. It may order you to lie, steal, rob, or to go out into the street and fight.

It claims the power to tell you what to think and what to do every day of your life.

When you become a Communist, you become a revolutionary agent under a discipline more strict than the United States Army, Navy, Marines, or Air Force have ever known.

*48. Why do people become Communists then?*

Basically, because they seek power and recognize the opportunities that Communism offers the unscrupulous.

But no matter *why* a particular person becomes a Communist, every member of the Party must be regarded the same way, as one seeking to overthrow the Government of the United States.

*49. What kind of people become Communists?*

The real center of power in Communism is within the professional classes.

Of course, a few poor people respond to the Communist claim that it is a "working class movement."

But taken as a whole the Party depends for its strength on the support it gets from teachers, preachers, actors, writers, union officials, doctors, lawyers, editors, businessmen, and even from millionaires.

*50. Can you quit being a Communist when you want to?*

The Communists regard themselves as being in a state of actual war against life as the majority of Americans want it.

Therefore, Party members who quit or fail to obey orders are looked on as traitors to the "class war" and they may expect to suffer accordingly when and as the Party gets around to them.

*51. How does the Communist Party of the United States work, day by day?*

The Communist Party of the United States works inside the law and the Constitution, and outside the law and the Constitution with intent to get control any way it can.

*52. What are some types of Communist activities within the law?*

Working their way into key positions in the schools, the churches,

the labor unions, and farm organizations. Inserting Communist propaganda into art, literature, and entertainment. Nominating or seeking control of candidates for public office. The immediate objective of the Communist Party is to confuse and divide the majority so that in a time of chaos they can seize control.

*53. What are some types of Communist activities outside the law?*

Spying, sabotage, passport fraud, perjury, counterfeiting, rioting, disloyalty in the Army, Navy and Air Force.

*54. What are some official newspapers or magazines of the Communist Party?*

Daily and Sunday Worker, 50 East Thirteenth Street, New York City; Morning Freiheit, 50 East Thirteenth Street, New York City; Daily Peoples World, 590 Folsom Street, San Francisco, Calif.; Masses and Mainstream, 832 Broadway, New York City; Political Affairs, 832 Broadway, New York City. There are also numerous foreign language publications.

*55. Does the Party also publish books and pamphlets?*

Yes, thousands of them, through such official publishing houses as: International Publishers, 381 Fourth Street, New York City; Workers Library Publishers, 832 Broadway, New York City; New Century Publishers, 832 Broadway, New York City.

*56. Does the Party have public speakers and press agents?*

Hundreds of them, paid and unpaid, public and secret, hired and volunteered, intentional and unintentional.

Publicity seeking is one of the Party's principal "legal" occupations, intended to confuse people on all important issues of the day.

*57. How does the Party get the money for all this?*

At first it received money from Moscow but now it raises millions of dollars here in the United States through dues, foundations, endowments, special drives, and appeals.

*58. Do only Communists carry out Communist work?*

No. The Party uses what it calls "*Fellow Travelers*" and "*Front Organizations*" in some of its most effective work.



### *59. What is a fellow traveler?*

One who sympathizes with the Party's aims and serves the Party's purposes in one or more respects without actually holding a Party card.

### *60. Is he important in the Communist movement?*

Vital. The fellow traveler is the **HOOK** with which the Party reaches out for funds and respectability and the **WEDGE** that it drives between people who try to move against it.

### *61. What is a Communist front?*

An organization created or captured by the Communists to do the Party's work in special fields. The front organization is Communism's greatest weapon in this country today and takes it places it could never go otherwise—among people who would never willingly act as Party agents.

It is usually found hiding among groups devoted to idealistic activities. Here are 10 examples out of hundreds of Communist fronts which have been exposed:

1. American Committee for Protection of Foreign Born.
2. American Slav Congress.
3. American Youth for Democracy.
4. Civil Rights Congress.
5. Congress of American Women.
6. Council for Pan-American Democracy.
7. International Workers Order.
8. National Committee to Win the Peace.
9. People's Institute of Applied Religion.
10. League of American Writers.

### *62. How can a Communist be identified?*

It is easy. Ask him to name ten things wrong with the United States. Then ask him to name two things wrong with Russia.

*His answers will show him up even to a child.*

Communists will denounce the President of the United States but *they will never denounce Stalin.*

### *63. How can a fellow traveler be identified?*

Apply the same test as above and watch him defend Communists and Communism.



*64. How can a Communist front be identified?*

If you are ever in doubt, write, wire or telephone the House Committee on Un-American Activities, Room 226, House Office Building, Washington 25, D. C. Telephone National 3120, Extension 1405.

*65. What do Communists call those who criticize them?*

"Red baiters," "witch hunters," "Fascists." These are just three out of a tremendous stock of abusive labels Communists attempt to smear on anybody who challenges them.

*66. How do they smear labor opposition?*

As "scabs," "finks," "company stooges," and "labor spies."

*67. How do they smear public officials?*

As "reactionaries," "Wall Street tools," "Hitlerites," and "imperialists."

*68. What is their favorite escape when challenged on a point of fact?*

To accuse you of "dragging in a red herring," a distortion of an old folk saying that originally described the way to throw hounds off the track of a hot trail.

*69. What is the difference in fact between a Communist and a Fascist?*

None worth noticing.

*70. How do Communists get control of organizations in which the majority are not Communists?*

They work. *Others won't.*

They come early and stay late. *Others don't.*

They know how to run a meeting. *Others don't.*

They demand the floor. *Others won't.*

They do not hesitate to use physical violence or ANY form of persecution. They stay organized and prepared in advance of each meeting. The thing to remember is that Communists are trained agents under rigid discipline, but they can always be defeated by the facts.

*71. When was the Communist Party of the United States organized, and where?*

September 1919, at Chicago.

*72. Has it always been called by its present name?*

No. Here are the recorded, official name changes:

1919—Communist Party of America, and the Communist Labor Party of America.

1921—The above parties merged into the United Communist Party of America.

1922—The Communist Party of America and the Workers Party of America.

1925—The above merged into one organization known as Workers (Communist) Party of America.

1928—Communist Party of the United States.

1944—Communist Political Association.

1945 to present—Communist Party of the United States of America.

*73. Why has it changed its name so often?*

To serve Moscow and evade the law of the United States.

*74. Why isn't the Communist Party a political party just like the Democratic and Republican parties?*

Because it takes its orders from Moscow.

*75. Are the Communists agents of a foreign power?*

Yes. For full details write the Committee on Un-American Activities, Room 226, House Office Building, Washington 25, D. C., for House Report No. 209, entitled The Communist Party of the United States as an Agent of a Foreign Power.

*76. Where can a Communist be found in everyday American life?*

Look for him in your school, your labor union, your church, or your civic club. Communists themselves say that they can be found "on almost any conceivable battlefield for the human mind."

*77. What States have barred the Communist Party from the ballot?*

Alabama, Arkansas, Illinois, Kansas, Ohio, Oklahoma, Oregon, Tennessee, and Wisconsin.

**78. *How does Communism expect to get power over the United States if it cannot win elections?***

The Communists only compete for votes to cover their fifth-column work behind a cloak of legality. They expect to get power by ANY means, just so they get it.

The examples of Poland, Czechoslovakia, and other countries in Europe show just how many methods Communism applies.

In each country different details—in all the same result.

**79. *Why don't Communists over here go to Russia if they like that system so much?***

They are on duty here to take over this country. They couldn't go to Russia even if they wanted to, except on orders from Moscow.

**80. *Which Communists get such orders?***

High Party officials and special agents who are to be trained in spying, sabotage, and detailed planning for capture of this country.

**81. *Where are they trained in Moscow?***

The Lenin Institute, a college in revolution which teaches how to capture railroads, ships, radio stations, banks, telephone exchanges, newspapers, waterworks, power plants, and such things.

**82. *Does Stalin let American Communists in to see him?***

Yes. Earl Browder and William Z. Foster, the two heads of the Party for the last 20 years, have both admitted under oath that they conferred with Stalin.

The records show that Browder, for instance, made 15 known trips to Moscow, several with false passports.

**83. *Are American Communists used in the Soviet Secret Service?***

Yes, here are the names of a few such agents proved on the public records:

Nicholas Dozenberg, George Mink, Philip Aronberg, Charles Dirba, Pascal Cosgrove, J. Mindel, Alexander Trachtenberg, Julia Stuart Poyntz, Jack Johnstone, Charles Krumbein, and Albert Feirabend.

**84. *What central organization controls all the Communist Parties of the world?***

An organization originally set up in Moscow by the Government of Russia, and known as the "Communist International" called *Comintern* for short.

It has since changed its name to "Communist Information Bureau" and is known as the *Cominform*.

*85. Who is the most important Communist in the United States today?*

The *Cominform* representative.

*86. Why is he here?*

To see that American Communists follow the orders of the Soviet-directed *Cominform* in all things.

*87. Do they?*

Yes.

*88. Has any representative of this central organization ever been caught?*

Yes. For example, over a period of 12 years one Gerhart Eisler, alias Brown, alias Edwards, alias Berger, did such work, making regular trips between the United States and Europe.

On February 6, 1947, his activities were exposed by the House Committee on Un-American Activities and he has since been convicted in court of perjury and contempt of Congress.

*89. What is the best way to combat Communism?*

Detection, exposure, and prosecution.

*90. Are these being done?*

Millions of dollars have been spent by the Federal Bureau of Investigation, Army and Navy Intelligence, and other executive agencies to detect and keep track of Communists since the Party's organization in this country a generation ago.

Exposure in a systematic way began with the formation of the House Committee on Un-American Activities, May 26, 1938.

Prosecution of Communists, as such, has never taken place in this country, as yet.



*91. Have any Communists been prosecuted on other grounds?*

Yes. For violations of such laws as those governing passports, immigration, perjury, criminal syndicalism, and contempt.

*92. Is this enough?*

No. The House of Representatives maintains this Committee on Un-American Activities to study the problems of Communism and all other subversive movements and recommend new laws if it feels they are needed.

*93. Has the Committee made any such recommendations?*

Yes. The latest is H. R. 5852, known as the Mundt-Nixon bill, which passed the House of Representatives on May 19, 1948, by a vote of 319 to 58.

*94. What does this bill do?*

The main points are:

To expose Communists and their fronts by requiring them to register publicly with the Attorney General and plainly label all their propaganda as their own.

To forbid Communists passports or Government jobs.

To make it illegal for ANYBODY to try to set up in this country a totalitarian dictatorship having ANY connection with a foreign power.

*95. What is Communism's greatest strength?*

Its secret appeal to the lust for power. Some people have a natural urge to dominate others in all things.

*Communism invites them to try.*

The money, hard work, conspiracy, and violence that go into Communism, add up to a powerful force moving in a straight line toward control of the world.

*96. What is Communism's greatest weakness?*

The very things that give it strength. For just as some people have a natural lust to dominate everybody else, so do most people have a natural determination to be free.

*Communism can dominate only by force.*



Communism can be stopped by driving every Communist out of the place where he can capture power.

*97. What is treason?*

Our Constitution says that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

*98. Are the Communists committing treason today?*

The Soviet Union has launched what has been called a "cold war" on the United States. Therefore, Communists are engaged in what might be called "**COLD WAR TREASON.**"

The Mundt-Nixon bill is intended to fight this "cold war treason."

If our war with Communism should ever change from "cold" to "hot" we can expect the Communists of the United States to fight against the flag of this country openly.

*99. What should I do about all this?*

Know the facts. Stay on the alert. Work as hard against the Communists as they work against you.

*100. Where can I get information about Communism regularly?*

Write the House Committee on Un-American Activities, Room 226, Old House Office Building, Washington, D. C., for a selected list of official publications.

## APPENDIX

Principal officers and offices of the Communist Party, U. S. A., as of 1947.

### COMMUNIST PARTY, UNITED STATES OF AMERICA

National headquarters: 35 East Twelfth Street, New York, N. Y.

Chairman—William Z. Foster.

General secretary—Eugene Dennis (Waldron).

Administrative secretary—John Williamson.

Treasurer—Vacant since the death of Charles Krumbein.

National secretariat:

William Z. Foster.

Gil Green.

Eugene Dennis.

Gus Hall.

Robert Thompson.

Irving Potash.

John Williamson.

Jack Stachel.

Benjamin J. Davis, Jr.

Carl Winter.

John Gates.

Henry Winston.

National committee:

William Z. Foster.

Gus Hall.

Benjamin J. Davis, Jr.

Nat Cohen.

Rose Gauden.

Ferdinand Smith.

Mickey Lima.

Abner Berry.

John Williamson.

Alexander Bittleman.

Nat Ganley.

Claudia Jones.

Bella Dodd.

Alexander Trachtenberg.

James Jackson.

David Davis.

Louis Weinstock.

Herb Signer.

William McKie.

Irving Potash.

Nat Ross (South).

Max Weiss.

Fred Blair.

Lem Harris.

Jack Stachel.

Hal Simon.

National review board:

Chairman—Ray Hansborough.

Vice chairman—Vacant since the death of Charles Krumbein.

Secretary—Saul Wellman.

William McKie.

National labor commission:

Chairman—John Williamson.

Secretary—William Albertson.

Administrative secretary—Robert Minor.

Al Blumberg.

Pat Toohey.

- National women's commission:  
 Chairman—Elizabeth Gurley Flynn.  
 Assistant secretary—Claudia Jones.
- National Negro commission:  
 Chairman—Josh Lawrence.  
 Secretary—Henry Winston.
- National group commission: Chairman—Steve Nelson.
- National farm commission:  
 Chairman—Max Weiss.  
 Secretary—Lem Harris.
- Organizing commission:  
 Secretary—Henry Winston.  
 Assistant Secretary—Betty Gannett.
- Coordinating Committee, National Maritime Field—Al Lannon.
- Jewish Commission:  
 Secretary—Moses Miller.  
 General Secretary—Alexander Bittleman.
- Veterans' commission:  
 Director—John Gates.                      Leon Straus.  
 George Blake.                                  Robert Thompson.  
 Joseph Clark.                                  Carl Vedro.  
 Louis Diskin.                                  George Watt.  
 Irving Goff.                                    Saul Wellman.  
 Howard Johnson.                              Herbert Wheeldin.  
 Herbert Kurzer.                                Henry Winston.  
 Carl Reinstein.
- Student's commission: Director—Marion Shaw.
- Legislative commission:  
 Chairman—Arnold Johnson.  
 Secretary—Robert Minor.
- Educational Agit-Prop., and publicity commission:  
 Chairman—Jack Stachel.  
 Secretary—Max Weiss.

#### DISTRICT AND LOCAL OFFICIALS

*Northeast district, 80 Boylston Street, Boston, Mass.*

(States included: Massachusetts, Maine, New Hampshire, Rhode Island, Vermont)

- Chairman (district)—(Manny) Emanuel Blum.  
 Secretary (district)—Fanny Hartman.  
 Chairman (Massachusetts section)—Otis A. Hood.  
 Committee members for Massachusetts:  
 Jack Green.  
 Hy Gordon (trade union secretary, Massachusetts).

William E. Harrison.

Arthur E. Timpson (husband of Anna Durlak).

Joseph C. Figueiredo (Bristol organizer).

Organizer, Boston—F. Collier.

Secretary-treasurer (district)—Hugo Gregory.

Educational director, Massachusetts—Alice Gordon.

State (Massachusetts) campaign committee—Frances Hood (Mrs. Archer Hood).

Chairman, New Hampshire section—Elba Chase Nelson.

Labor secretary and Massachusetts organizer—Daniel Boone Schirmer.

Chairman (Maine)—Lewis Gordon.

*Eastern Pennsylvania-Delaware district, 250 South Broad Street,  
Philadelphia, Pa.*

(States included: Eastern Pennsylvania and Delaware)

Chairman (district)—Phil Bart.

Secretary (district)—Bob Klonsky.

Committee members:

Tom Nabried.

Bill McKane.

Estelle Shohen.

Jessie Schneiderman.

Carl Reeve.

Sam Donchin.

Jules Abercaugh.

John Devine.

Secretary, thirty-sixth ward (Philadelphia)—Bill Brockman.

Financial secretary (district)—Ben Weiss.

Organizer, Wilkes-Barre section—Joseph Dougher.

Organizer (district)—Sam Rosen.

Member, labor committee—David Davis.

*Western Pennsylvania district, 417 Grant Street, Pittsburgh, Pa.*

(Western Pennsylvania)

Chairman—Roy Hudson.

Secretary—Dave Grant.

Organizer—J. G. Eddy.

Chairman, Lawrenceville section—Matt Cortich.

Organizer, Lawrenceville section—Eleanor Sackter.

Organizer, Jones & Laughlin Club of Communist Party (Pittsburgh)—Sam Reed.

Youth organizer, Pittsburgh—Mike Hanusik.

Executive secretary (district)—Peter Edward Karpa.

Committee members:

Joe Godfrey.

Ben Careathers.

Elmer Kish.

Gabor Kist.

Dave Grant.

*Maryland-District of Columbia district, 210 West Franklin Street, Baltimore, Md., and 527 Ninth Street NW., Washington, D. C.*

(Maryland and Washington, D. C.)

Chairman (district)—Phil Frankfeld.  
Secretary (district)—Dorothy Blumberg.  
Chairman (District of Columbia section)—William Taylor.  
Vice chairman (District of Columbia section)—William S. Johnson.  
Secretary (District of Columbia section)—Elizabeth Searle.  
Treasurer (District of Columbia section)—Mary Stalcup.  
Literary director (District of Columbia section)—Casey Gurewitz.  
Cumberland organizer—Mel Fiske.  
Director, membership committee—Constance Jackson.

*District of Ohio, 2056 East Fourth Street, Cleveland, Ohio*

(State of Ohio)

Chairman—Gus Hall.  
Secretary—Martin Chancey.  
Organizing secretary—Frieda Katz.  
Organizer—A. Krchmarek.

Committee members:

Gus Hall.	Carl Guilood.
Abe Lewis.	Elmer Fehlhaber.
Edward Chaka.	Martin Chancey.
Bernard Marks.	Mike Davidow.
Robert Hamilton.	

Chairman, Cedar-Central section—Abe Lewis.  
Chairman, Cuyahoga County section—Gus Hall.  
Chairman, Cleveland County section—Elmer Fehlhaber.  
Secretary, Cleveland County section—Mike Davidow.  
Organizer, Toledo section—Nat Cohn.  
Organizer, Cincinnati section—Robert Gunkel.  
Organizer, Akron section—Bernard Marks.

*Minnesota, North Dakota, and South Dakota district, 1216 Nicollet Street, Minneapolis, Minn.*

(States included: Minnesota, North Dakota, and South Dakota)

Chairman (district)—Martin Mackie (Minnesota).  
Secretary (district)—Carl Ross.  
Assistant secretary (district)—Rose Tillotson.  
Chairman, Hennepin County section (Minnesota)—Robert J. Kelly.  
Secretary, Pine County, Minn., district—Clara Jorgensen.



*District of Indiana, 29 South Delaware Avenue, Indianapolis, Ind.*

(State of Indiana)

Chairman—Elmer Johnson.

Secretary—Henry Aron.

Legislative director, Indiana and Illinois—William Patterson.

Committee members:

Elmer Johnson.

Benjamin Cohen.

Morris Porterfield.

Imogene Johnson.

Sylira Aron.

*District of Michigan, 902 Lawyers Building, Detroit, Mich.*

(State of Michigan)

Chairman—Carl Winter.

Secretary—Helen Allison.

National committee representative—James Jackson.

Educational director—Abner Berry.

Youth director—Robert Cummings.

Daily Worker representative—Mabel Mitchell.

Organizer—Fred Williams.

Committee members:

Hugo Beiswenger.

Joe Brandt.

Geneva Olmsted.

Chairman, Ypsilanti, Willow Run section—Thomas Dennis.

Chairman, Flint section—Thomas Kelly.

Chairman, Hamtramck section—Thomas Dombrowski.

Secretary, New Haven—Joseph Gonzales, Jr.

State literature director—Byron Edwards.

Chairman, Flint—Berry Blossinghame.

Chairman, Michigan Avenue, Detroit section—John Hell.

*District of Illinois, 208 North Wells, Chicago, Ill.*

(States included: Illinois and Kentucky)

Chairman, Illinois section—Alfred Wagenknecht.

Chairman (district)—Gil Green.

Vice Chairman—William L. Patterson.

Assistant secretary—Victoria Kramer.

Legislative director, Illinois section—Edward Starr.

Labor secretary, Illinois section—Fred Fine.

Chairman, East Side Chicago section—Claude Lightfoot.

Section organizer—Jim Keller.

Organizer—Henry Davis.

Section organizer, Ninth Congressional District—Ethel Shapiro.

Organizer, South Chicago section—James Balanoff, Jr.

Chairman, twenty-eighth ward—Sylvia Woods.

Chairman, third ward—Ishmael Flory.

*District of New York, 35 East Twelfth Street, New York, N. Y.*

(State of New York)

Chairman—Robert Thompson.

Vice chairman—Rose Gaulden.

Organizing secretary—William Norman

Organizer—Donald MacKenzie Lester.

Director of education—William Weinstone.

Secretary of education—Sam Coleman.

Legislative director—Bella Dodd.

Farm organizer—George Cook.

Youth director—Lou Diskin.

Secretary, legislative committee—Lillian Gates.

Director, industrial section—Ben Gold.

Chairman, Negro committee—Charles Lohman.

Director, veterans' committee—John Gates.

Assistant director, veterans' committee—Howard Johnson.

Director, Daily Worker veterans' committee—Joe Clark.

Assistant organizational director—Charles Lohman.

Chairman, Communist Party Club, New York City—Leon Beverley.

Water front organizers—Tom Christensen and Al Rothbart.

Italian section organizer—Antonio Lombardo.

State secretariat:

Robert Thompson.

Hal Simon.

Israel Amter.

William Norman.

Committee members (in addition to above):

Nat Slutsky (section organizer).

Michael Salerno.

Elwood Dean.

George Watt.

Harlem section:

Chairman—Benjamin J. Davis, Jr.

Executive secretary—Robert Campbell.

Administrative secretary—John Lavin.

Industrial section director—Rose Gaulden.

Organizing director—Anselo Cruz.

Organizing secretary—Bonita Williams.

Educational director—Carl Dorfman.

Committee members:

Bob Campbell.

Bonita Williams.

Rose Gaulden.

Larry Washington.

Leon Love.

Carmen Lopez.

Horace Marshall.

Benjamin J. Davis, Jr.

Sam Patterson.

Maude White.

Cyril Phillips.  
Fern Owens.  
Theodore Bassett.  
John Lavin.

Letty Cohen.  
Herb Whiteman.  
Oscar James.

**New York County section:**

Executive secretary—George Blake Charney.  
Membership director—Clara Lester.  
Educational director—Rebecca Grecht.  
Executive committee members:

James Tormey.  
Louis Mitchell.  
Howard Johnson.  
Esther Cantor.  
Tom Christensen.

Robert Campbell.  
Ester Letz.  
David Greene.  
Evelyn Wiener.  
Alvin Warren.

**Queens County section:**

Chairman—Paul Crosbie.  
Organizer—Dave Rosenberg.  
Secretary—James A. Burke.  
Educational director—Helen Stuart.  
Organizing secretary—Fay Collar.  
Sectional organizer—Milton Goldstein.

**Bronx section:**

Chairman—Isidora Begun.  
Organizing secretary—Bob Appel.  
Press director—Bob Alpert.  
Educational director—Robert Klonsky.  
Assistant educational director—Henry Kuntzler.

**King's County section:**

Chairman, women's committee—Margaret Cowl (Krumbein).  
Sectional organizer—Carl Vedro.  
Press director—Mickey Langbert.

**Essex County section:** Chairman—Martha Stone.

**Manhattan County section:**

Executive secretary—George Charney.  
Press director (industrial)—Al Reger.

**Brooklyn section:** Organizing secretary—John White.

**Miscellaneous sections:**

Chairman, Buffalo—Lloyd Kinsey.  
Organizer, Buffalo—Nicholas Kosanovich.  
Assistant to chairman, Buffalo—Norman Ross.  
Chairman, Rochester—Gertrude Kowal.  
Chairman, Syracuse—George Sheldrick.  
Chairman, Utica—Murray Savage.  
Chairman, Schenectady—Harold Klein.

Chairman, Binghamton—Irving Weissman.  
 Chairman, Yonkers—Edna Fried.  
 Chairman, Astoria, Long Island—Esther Signer.  
 Secretary, Nassau County—John Lavin.  
 Secretary, Coney Island—William Albertson.  
 Organizing secretary, eastern New York—Morris Smith.  
 Director, Nassau County—Jim Faber.  
 Chairman, Melrose—Joe Jackson.  
 Literature director, Middletown—Rose Walsh.  
 Organizing secretary, Williamsburg—Leon Nelson.  
 Organizer, Brownsville—Abe Osheroff.  
 Organizer, Nassau—Sam Faber.  
 Chairman, Westchester—Herbert L. Wheeldin.  
 Section organizer—Leon Nelson.  
 Press director, Bright Beach—Harry Klein.  
 Organizer, Morrisania—Morris Stillman.  
 Organizer, Allerton—Bernard Schuldiner.  
 Organizer, Parkchester—Sparky Friedman.  
 Organizer, Jamaica—Charles Evans.

*Northwest district, 1016½ Second Avenue, Seattle, Wash., and 916 East Hawthorne Street, Portland, Oreg.*

(States included: Idaho, Oregon and Washington)

Chairman (district)—Henry Huff.  
 Labor secretary (district)—Andre Remes.  
 Secretary Pierce County section—Clara Sear.  
 Director, People's World, Seattle—Marx Blashko.

Committee members (in addition to above):

C. Van Lydegraf.

Edward Alexander.

Barbara Hartle.

Chairman, Spokane section—William L. Cumming.  
 Chairman, Oregon section—Ead Payne.  
 Secretary, Oregon section—Mark Haller.

*District of California, 942 Market Street, San Francisco, Calif.*

(State of California)

Chairman—William Schneiderman.  
 Organizing secretary—Loretta Starvis.  
 State treasurer—Anita Whitney.  
 State field organizer—Mickey Lima.  
 State educational director—Celeste Strack.  
 People's Daily World circulation director—Leo Baroway.  
 Chairman youth commission—George Kaye.



Chairman, Jewish commission—A. Olken.  
State press director—Ida Rothstein.  
State youth director—George Kaye.  
Labor secretaries—Archie Brown and Leon Kaplan.

Committee members:

John Pittman.	Loretta Starvis.
Louise Todd.	Nemmy Sparks.
Ray Thompson.	Clarence Tobey.
William Schneiderman.	George Lohr.
Pettis Perry.	Mickey Lima.

State political editor—Douglas Ward.  
Secretary, water-front section—Herbert Nugent.  
Los Angeles County section:  
Chairman—Nemmy Sparks.  
Labor secretary—Ben Dobbs.  
Press director—Elizabeth Ricardo.  
Chairman, minorities commission—Pettis Perry.  
Organizing secretary—Dorothy Healy.  
Editor, People's Daily World—Sidney Burke.  
Chairman Sixteenth Congressional District—Emil Freed.  
Section organizer—Alvin Averbuck.  
Legislative director—Harry Daniels.  
Harbor section organizer—Jim Forrest.  
Veterans' director—Merel Brodsky.  
Youth director—Phil Bock.  
Secretary, Carver Club section—Mort Newman.  
Candidate, board of education—La Rue McCormack.  
Candidate, councilman—Henry Steinberg—Ninth District.  
Candidate, councilman—James C. McGowan—Eleventh District.  
Candidate, councilman—Elsie M. Monjar—Eighth District.  
Director, West Adams Club of Communist Party—Joe Klein.  
Social activity secretary, 62 AD, Communist Party—Ida Elliott.  
Northern California section:

Chairman, San Francisco section—Oleta Yates.  
Legislative director, San Francisco section—Herb Nugent.  
Labor director, San Francisco—Leon Kaplan.  
Water-front organizer—Alex Freskin.  
Educational director, San Francisco—Aubrey Grossman.

San Diego County section: Chairman—Enos J. Baker.

Alameda County section:

Chairman—Lloyd Lehman.  
Labor director—Wesley Bodkin.  
Organizer, Ben Davis Club of Communist Party (Alameda)—Buddy Greer.  
Trade-union director, Harriet Tubman Club of Communist Party (Alameda)—Helen Bodkin.



Miscellaneous section:

President, Santa Monica Club of Communist Party—David Grant.  
Chairman, Contra Costa County—Mildred Bowen.  
Chairman, Hollywood section—John Stapp.  
Press director, East Side Youth Club (Los Angeles)—Libby Wilson.  
Organizer, North Oakland section—George Edwards.

*District of Arizona, 716½ North Washington Street, Phoenix, Ariz.*

(State of Arizona)

Chairman—Morris Graham.

Committee members:

Lewis Johnson.

Karl M. Wilson.

Chairman, Maricopa County—M. Dallen.

*District of New Jersey, 38 Park Place, Newark, N. J.*

(State of New Jersey)

Chairman—Sid Stein.

Organizing secretary—Larry Mahon.

Section organizer, Plainfield—Al Muniz.

Committee members:

Martha Stone (Scherer).

Tom Scanlon.

Irving Glassman.

Joseph Magliaco.

Elwood Dean.

Mrs. Gaetana Mahan.

*District of Connecticut, 231 Fairfield Avenue, Bridgeport, Conn.*

(State of Connecticut)

Chairman—Joe Roberts.

Secretary—Mike Russo.

Committee members (in addition to above):

Rudolph Gillespie.

Roy A. Leib.

Chairman, Hartford section—Roy A. Leib.

Chairman, New Haven section—Sidney S. Taylor.

*District of Wisconsin, 617 North Second Street, Milwaukee, Wis.*

(State of Wisconsin)

Chairman—Fred Blair.

Secretary—E. Eisenscher.

ate committee—Sigmund Eisenscher.

Chairman, Milwaukee section—G. Eisenscher.

Chairman, sixth ward—Joe Ellis.

Secretary, Milwaukee section—Clarence Blair (alias Clark).

Organizer, Milwaukee—James Phillips.

*District of Colorado, 929 Seventeenth Street, Denver, Colo.*

(States included: Colorado, New Mexico, and Wyoming)

Chairman—William Dietrich.

Secretary—Arthur W. Barry.

Organizational secretary—Tracy Rogers.

*District of Missouri, 1041 North Grand Street, St. Louis, Mo.*

(State of Missouri)

Chairman—Ralph Shaw.

Secretary—Nathan Oser.

*District of West Virginia, Charleston, W. Va.*

(State of West Virginia)

Chairman—Ted Allen.

*Southern District*

(States included: Texas, Louisiana, Florida, Georgia, Virginia, Alabama, Mississippi, Tennessee, Oklahoma, North Carolina, and South Carolina)

Chairman, Texas—Ruth Koenig, 305 Herman Building, Houston, Tex.

Executive secretary, Texas—James J. Green.

Chairman, Houston section—William C. Crawford.

Chairman, Louisiana—James E. Jackson, Jr.,

Secretary, Louisiana—Kay Davis, Godchaux Building, New Orleans, La.

Chairman, Florida-Georgia—Alex W. Trainor, 1546 Loma, Jacksonville, Fl

Organization secretary, Florida-Georgia—Homer Chase.

Chairman, Virginia—Alice Burke, 102 North Eighth, Richmond, Va.

Chairman, Alabama-Mississippi-Tennessee—Harold Bolton.

Secretary, Alabama-Mississippi-Tennessee—Andy Brown.

Press director, Alabama-Mississippi-Tennessee—Harry Raymond.

Organizer, Alabama-Mississippi-Tennessee—Mary Southard.

Chairman, Oklahoma—Allen Shaw.

District organizer, Oklahoma—H. Smith, Oklahoma City, Okla.

Organizing secretary, Oklahoma—Al Lowe.

Organizing secretary, North and South Carolina—Sam Hall.

*District of Montana, 2117 Fourth Avenue South, Great Falls, Mont.*

(State of Montana)

Chairman—Ira Siebrasse.

*District of Nebraska, 415 Karback Building, Omaha, Nebr.*  
(State of Nebraska)

State chairman—Warren Batterson.

*District of Utah, 75 Southwest Temple Street, Salt Lake City, Utah*  
(State of Utah)

State chairman—Wallace Talbot.

State secretary—Joseph Douglas.

*"No Communist, no matter how many votes he should secure in a national election, could, even if he would, become President of the present government. When a Communist heads the government of the United States—and that day will come just as surely as the sun rises—the government will not be a capitalist government but a Soviet government, and behind this government will stand the Red army to enforce the dictatorship of the proletariat."*

Sworn statement of

WILLIAM Z. FOSTER

*Head of the Communist Party  
in the United States*

Mr. Margolis: I would like, your Honor, for the record to show the purpose for which that document is offered.

The Court: Go ahead.

Mr. Margolis: I would like to have the document before me at the time.

The Court: You only have one copy?

Mr. Margolis: I only have one, your Honor.

(The document referred to was passed to counsel.)

Mr. Margolis: We are offering this for the purpose not of establishing the truth of the statements made therein but [76] simply for the purpose of establishing the fact that an agency of the government of the United States has made these statements, this fact being offered to show the reasonable apprehension of danger to themselves on the part of these defendants.

In other words, that where a government agency makes the statements which points to the possibility of self-incrimination in a particular situation, the defendants are entitled, we believe, to rely upon those statements having been made as an indication of the danger.

Now there are 100 questions and answers here which I won't take the time to go into, but they indicate that in the opinion of a government agency, a committee of Congress, the Communist Party is an illegal organization.

Also there is an appendix attached to it, which



is a part of the document, and that appendix sets forth the principal officers and offices of the Communist Party, U. S. A., as of 1947, and it gives the Communist Party, United States of America, first, with the national headquarters, and then it gives various district and local information. Then on pages 25 and 26 there is what purports to be information, at least setting forth the belief and the information of this committee with respect to the District of California of the Communist Party of the United States of America, indicating among other things that Nemmy Sparks was a state committee member [77] and chairman of the Los Angeles Communist section, that Ben Dobbs was labor secretary, that Dorothy Healey was organizing secretary, that Alvin Averbuck was section organizer, that Harry Daniels was legislative director, that Merle Brodsky was veterans' director, that Phil Bock was youth director, that Mort Newman was secretary of the Carver Club section, that Henry Steinberg was candidate for councilman of the Ninth District—I am reading only the names of those people mentioned here who have been involved in any of these proceedings—indicating two things: (1) that the official agency of the government of the United States has information indicating that the Communist Party of Los Angeles County is a part of the Communist Party of the United States, and that many of the people involved in these proceedings are or were officers of that organization.

Now, your Honor, I have handed counsel another document.

The Court: I suppose I should say, while you are on this subject, in view of your statement, that it would also indicate to me as a judge that these witnesses called before the grand jury by virtue of this public information are persons who could be likely to give the information desired by the grand jury concerning the membership records of the Los Angeles County Committee of the Communist Party, or the Los Angeles County Communist Party, or however it happens to be designated. [78]

Mr. Margolis: That is not the issue we are raising, your Honor. We are not raising as a defense that they do not have the information. That could be answered by answering the questions.

The Court: I understand.

Mr. Margolis: Our defense is the possibility of self-incrimination.

Now I have handed counsel another document. Have you had opportunity to examine it?

Mr. Goldschein: No, sir.

Mr. Carter: I have looked it over.

Mr. Margolis: I have here a document which is a mimeographed copy of a press release dated June 15, 1949 issued by the Department of Justice in Washington, D. C., obtained from the Department of Justice in Washington, D. C., through official channels, that is, through regular channels of

getting regularly press releases from that organization, which press release is entitled, "Some Activities of the Department of Justice in the Field of Internal Security," and in order to state the purpose of this offer I want to refer to just a couple of short paragraphs in this press release.

Mr. Goldschein: Are we to understand that the court is to take judicial notice of this document that he is now attempting to get into the record? The previous one I understood was printed by the Government Printing Office. [79]

Mr. Margolis: Do you deny that this is a government press release?

Mr. Goldschein: I don't know anything about it. Are you testifying that it is, under oath?

Mr. Margolis: I can put on evidence to support it, your Honor. I can put on evidence to support the manner in which this was obtained, to show that this was obtained officially in the regular course from the Department of Justice as one of their press releases, that we were put on a mailing list to get their press releases, and in order that there may be no question about this I am perfectly willing to offer this subject to what is very often done where people want to get the truth in the record, to the right of the government to check, which they can very easily do, with Washington as to whether or not this is a press release which was issued by the Department of Justice in Washington or whether it is not.

The Court: Of course the person asserting the affirmative has the burden of establishing it. If you are asserting that that is a press release you have the burden of establishing it. I know that press releases are issued but I don't know what dignity they have in so far as evidence is concerned. I have seen a great many of them issued by various government departments which would not obtain a very dignified status.

Mr. Margolis: They may be dignified or undignified—and [80] I think this is a particularly undignified one, your Honor—but that isn't the point. The point I am making is that here is a press release and a statement of policy on the part of the Department of Justice which we contend establishes conclusively the danger to which these defendants would be exposed if they answered these questions—establishes it beyond any doubt.

The Court: Government counsel is objecting, and I take it the basis of their objection is that there is no foundation laid, from Mr. Goldschein's statement.

Mr. Goldschein: I don't know what it is. I never saw it until it was placed on the desk here.

Mr. Carter: It has not been offered in evidence yet. So far counsel is just starting to read from it. I suggest it be offered in evidence and the record show the objection and we can have some orderly process here.

The Court: Do you want to mark it for identification.

Mr. Margolis: Very well.

(The document referred to was marked Defendants' Exhibit B for identification.)

Mr. Margolis: If the government is going to challenge the foundation I will first request of this court that it do something which at least I have seen done very frequently in litigation, ask the government to verify whether or not that is a press release. It is a very simple thing for them to [81] do, and I think that the court should——

The Court: No, you are offering this and, like every other case, when counsel offers a document in writing they establish some kind of a foundation for it. The burden is not upon the other person to show that it is not a press release. You are offering it as a press release. Let us proceed in the orderly way, counsel.

Mr. Margolis: The witness whom I will use to establish the foundation is not in the courtroom at the moment, so I will pass on to another subject.

The Court: Do you wish a subpoena issued for him?

Mr. Margolis: No, it is not necessary.

The Court: Very well.

Mr. Margolis: Is Mr. Richard B. Hood in the courtroom?

Mr. Hood: Yes.



RICHARD B. HOOD

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, sir?

The Witness: Richard B. Hood.

The Clerk: Your address?

The Witness: 510 South Spring Street.

The Clerk: Take the stand, please. [82]

Direct Examination

By Mr. Margolis:

Q. What is your business or occupation, sir?

A. I am Special Agent in Charge of the Los Angeles Office of the Federal Bureau of Investigation.

Q. How long approximately have you held that position?      A. Nine years.

Q. In that capacity are you in charge of all investigating activities of the Federal Bureau of Investigation in the Los Angeles area, subject of course to your superiors in other areas?

A. I am in charge generally of all the activities of the office.

Q. And as the man in charge of the office, you work, do you not, very closely with the United States Attorney for this area, is that correct?

A. That is correct.

Q. And furnish him with whatever information you can obtain which would be helpful to him in any investigation which he has conducted, is that correct?

(Testimony of Richard B. Hood.)

A. That is not quite correct. He does not conduct the investigation.

Q. In any investigations which are being conducted by the grand jury but in which he participates as United States Attorney? [83]

A. Only those cases which are within the investigative jurisdiction of our Bureau.

Q. Do investigations concerning loyalty of government employees or concerning whether or not government employees have made false statements to the government fall within the jurisdiction of your Bureau?

A. Under the provisions of a Presidential order of the loyalty program, investigations are handled by the Federal Bureau of Investigation.

Q. Then your answer to my last question is "Yes," is it not, sir? A. Yes.

Q. You are aware of the fact, are you not, that for the past several months the grand jury—I will withdraw that.

You are aware, are you not, of the fact that for the past several months a grand jury in this district, with the assistance of the United States Attorney, has been conducting an investigation with respect to whether or not certain government employees have made false statements and which has been entitled, Investigation of Loyalty of Government Employees? A. Yes.

Q. Have you been asked to and have you—I will withdraw that.

(Testimony of Richard B. Hood.)

Have you been asked by the United States Attorney to furnish any information—without stating what that information [84] is—any information to him concerning the subject matter of that investigation?

Mr. Goldschein: I object to that, may it please the court, as being a general inquiry, that doesn't affect any fact in issue in this matter before the court.

The Court: That appears to be a preliminary question, whether or not he has been asked to furnish any information. Objection overruled.

The Witness: Yes.

Q. (By Mr. Margolis): And again without specifying what information you have furnished, have you, pursuant to such request, furnished information?

Mr. Goldschein: We object to that, may it please the court, as not being a fact in issue .

The Court: It is preliminary, I take it.

Mr. Margolis: It is, your Honor.

The Court: Objection overruled.

The Witness: Yes.

Q. (By Mr. Margolis): Now I am going to ask you some questions with respect to information which you furnished and so my questions will be entirely clear, Mr. Hood, I am not inquiring as to the specific information furnished but whether or not you furnished information of a particular character. In other [85] words, if I were to ask you,

(Testimony of Richard B. Hood.)

so it is clear, whether or not you furnished names, I am not asking for the names, I am asking just whether or not you did furnish names.

Now, Mr. Hood, have you furnished the United States Attorney information concerning the organizational structure of the Communist Party of Los Angeles County?

Mr. Goldschein: We object to that, may it please the court.

Mr. Carter: Let us make our objection more specific.

It is objected to upon the ground that it calls for information concerning the activities of the chief investigator for the Federal Government in this area, matters which he would know in his confidential knowledge and which he would not be required to disclose, therefore it is objected to on the ground that it is privileged.

Also objected to upon the further ground it is immaterial.

Mr. Margolis: I am not going to ask for the specific information furnished. I intend to ask a series of questions——

The Court: Let me hear the question again.

(The question referred to was read by the reporter as follows:

(“Q. Now, Mr. Hood, have you furnished the United States Attorney information concerning the organizational structure of the Communist Party of Los Angeles County?”) [86]

(Testimony of Richard B. Hood.)

The Court: Objection sustained.

Q. (By Mr. Margolis): Mr. Hood, have you furnished the United States Attorney with information as to who the officers of the Communist Party of Los Angeles County have been and are?

Mr. Goldschein: Same objection.

The Court: Objection sustained.

Q. (By Mr. Margolis): Mr. Hood, have you furnished the United States Attorney with information——

The Court: And a further ground on which I am sustaining it is that it is immaterial.

Mr. Margolis: I will start over again.

Q. Have you furnished the United States Attorney with information as to whether or not the Communist Party has clubs and how many clubs it has?

Mr. Goldschein: Same objection.

The Court: Same ruling.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to whether or not the Communist Party has divisions and how many divisions it has?

Mr. Goldschein: Same objection.

The Court: Objection sustained. [87]

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to whether the Communist Party of Los Angeles County is a part of the Communist Party of the United States?



(Testimony of Richard B. Hood.)

Mr. Goldschein: Same objection.

The Court: Same ruling.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to who is the chairman of the eastern division of the Los Angeles County Communist Party?

Mr. Goldschein: Same objection.

The Court: Objection sustained.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to who is the head of the southern division of the Los Angeles County Communist Party?

Mr. Goldschein: Same objection.

The Court: Sustained.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to who is the head of the youth division of the Los Angeles County Communist Party?

Mr. Goldschein: Same objection.

The Court: Sustained. [88]

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to who is the head of the student section of the youth division?

Mr. Goldschein: Same objection.

The Court: Objection sustained.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to whether or not each division has an organizer or chairman?

(Testimony of Richard B. Hood.)

Mr. Goldschein: Same objection.

The Court: Objection sustained.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to whether each division has an organizational secretary?

Mr. Goldschein: Same objection.

The Court: Same ruling.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to whether each division—and each of these questions have been directed to divisions of the Communist Party of Los Angeles County, and I believe it has been so understood?

The Court: Divisions, sections, etc. [89]

Q. (By Mr. Margolis): Whether each division has a membership or social secretary?

Mr. Goldschein: Same objection.

The Court: Same ruling.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to whether the membership or social director of each division has a list of the membership of that division?

Mr. Goldschein: Same objection.

The Court: Objection sustained.

Q. (By Mr. Margolis): Have you furnished the United States Attorney with information as to whether each division has a financial director?

Mr. Goldschein: Same objection.

(Testimony of Richard B. Hood.)

The Court: Another ground upon which I am sustaining the objection is this: This is an inquiry by the grand jury. The grand jury are the ones who must be satisfied that there is a probability of a crime committed and what information the United States Attorney may have does not necessarily mean that it might be communicated in a legal way to the grand jury for them to act upon.

Mr. Margolis: It does go to the question of whether or [90] not this is an investigation which is being conducted for the bona fide purpose by the United States Department of Justice of getting information or is being conducted for the purpose of trying to send some people to jail because they refuse to incriminate themselves. I am offering it for that purpose and I have other material on that question, among other purposes. I am not limiting my offer to that purpose, however.

The Court: The statement which I just made will apply to the previous rulings which I have also made. I suppose it comes under the general head of immateriality. In other words, that it is wholly immaterial what the United States Attorney has, what information has been furnished to him, when the inquiry is by the grand jury.

Proceed.

Q. (By Mr. Margolis): Mr. Hood, have you furnished the United States Attorney with information as to whether the membership director or the financial director has the books and records of the Los Angeles County Communist Party?

(Testimony of Richard B. Hood.)

Mr. Goldschein: Same objection.

The Court: Same ruling.

Mr. Margolis: I have no further questions.

I would merely like to state, your Honor, that I expected to elicit from this witness answers which would indicate that [91] all of the information concerning which I asked him was furnished by the Federal Bureau of Investigation to the United States Attorney.

The Court: I cannot decide things on what somebody expected to elicit.

Mr. Margolis: I am saying that for the record, your Honor.

The Court: Are there any further questions of this witness?

Mr. Margolis: No further questions.

The Court: Cross-examine?

Mr. Carter: No cross-examination.

The Court: Witness excused.

(Witness excused.)

The Court: Next witness.

Mr. Margolis: The only thing I have, your Honor, is the witness I was going to put on in connection with that document, Mr. Wirin. He received the document and he can testify to its official character. He was supposed to be here this morning but apparently he stepped into another courtroom. I wonder if I might look for him?

The Court: Do you know Mr. Wirin, Mr. Brand?

The Bailiff: Yes, your Honor.

The Court: Will you see if you can find him?

Mr. Margolis: He left his brief case here so I don't [92] think he is very far away, but I don't know where he is.

The Court: Let me straighten this out, counsel.

I have here the four volumes of the transcript of record in the Court of Appeals, Nos. 12217 to 12221, in the matter of Kasinowitz, and they were offered merely for the convenience of the court at the last hearing, is that correct, or were they offered in evidence? I ordered everything in evidence that had previously been in these proceedings whether they were in the transcript of record or not.

Mr. Margolis: As I recall the situation, your Honor said that he can take judicial notice of what had happened before him and that I, under those circumstances, didn't care whether they were marked in evidence, for identification or what.

The Court: Very well. I just wanted to see that the record was straight on that.

Then if there is no objection I will keep these as a convenient form to refer to.

Mr. Margolis: There is no objection on my part, your Honor.

The Court: Very well.

Mr. Brand indicates that he is not in any of the other courtrooms here.

Mr. Margolis: I see it is almost noon, your Honor, and we won't finish. Perhaps we can take



our recess until 2:00 [93] o'clock now. Mr. Wirin had told me he was going to be here all morning.

The Court: That is the only other witness that you expect to have?

Mr. Margolis: That is the only other witness I have.

The Court: You have no other matters to present?

Mr. Margolis: Outside of argument, your Honor.

The Court: Very well. Recess to 2:00 o'clock.

(Whereupon, at 11:50 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [94]

June 23, 1949; 2:00 o'Clock P.M.

The Court: Are there any ex parte matters?

The Clerk: No exparte, your Honor. Further trial.

The Court: The record will show the defendants are present in person and by counsel.

Proceed. You had a witness, Mr. Margolis?

Mr. Margolis: As I told your Honor, my witness is Mr. Wirin who was simply going to testify for the purpose of identifying this document. I found out over the noon hour what happened to Mr. Wirin. He became ill and he went home and he is at home ill.

Now I have one of two choices to make: I either may ask for a continuance to put on his testimony, because I arranged to have him here this morning,

he came here and the illness, due to no direct fault of the defendants or counsel; or I can state to the court and to counsel, if they are willing to accept it, what he would testify to. It is a very simple thing. It is not a very complicated thing I don't think it would require any cross-examination.

If your Honor would care to have me do that, I would be glad to do that, otherwise I must ask the court for a continuance.

Mr. Goldschein: Let us hear what it is.

Mr. Margolis: May I state it, your Honor? [95]

Mr. Goldschein: That was a request of the court. I am sorry. I should have arisen when I made it.

The Court: Proceed.

Mr. Margolis: Mr. Wirin would testify that some time ago he wrote to the Attorney General's office in Washington, D. C., and asked to be put on their regular mailing list for their press releases, that since that time he has received regularly from the office of the Attorney General various documents similar in makeup—although varying in content, of course—to the one which has been marked, I believe, B for identification here.

That he received this one from the Attorney General's office in an envelope indicating it came from the Attorney General's office in the usual course in which he had received other releases pursuant to his request, and that that is the document which he so received.

Mr. Goldschein: And that he got it when?

Mr. Margolis: I don't know the exact date on which he got it.

Mr. Goldschein: What is it dated?

Mr. Margolis: There is a date on there.

The Court: June 15, 1949. It has a mimeographed date at the top of the first page.

Mr. Margolis: I know it is very recent because he called it to my attention immediately after he got it, and [96] he called it to my attention just recently.

Mr. Goldschein: Here is another objection to the admissibility of that particular document. If it is dated June 15, Washington, D. C.—

The Court: No, it does not say "Washington, D. C."

Mr. Goldschein: It is dated the 15th, so it was evidently sent out sometime after that date, on or after that date. Certainly the witnesses knew nothing about it at the time they were ordered to appear before the grand jury and testify, and certainly there was nothing in that that could have frightened them since they knew nothing about it. There is no occurring danger from that record.

Mr. Carter: Let us do one thing at a time. We are willing to stipulate, for what it is worth, that if Mr. Wirin were called as a witness he would testify as stated by Mr. Margolis, reserving our right to make suitable objections.

Mr. Margolis: At this time, then, your Honor—is that acceptable, your Honor?

The Court: Yes.

Mr Margolis: At this time, your Honor, I then offer this document, and with respect to the statement made by Mr. Goldschein, I want to point out that the question is whether there is a reasonable basis for fear of incrimination.

We have all the way through claimed that it was the policy of the government to prosecute Communists because of the [97] fact that they were Communists or because of the fact that the government believed that they were Communists.

This release states that this case, this very case in this court, is part of the campaign against Communism, that this case is part of the government's campaign against Communism, something which we have been contending all along.

This also says—refers to the defendants in this case as alleged Communists, and to the fact that this is one of a series of Communist prosecutions.

Now it seems to me, your Honor, that this perfectly demonstrates that what we are saying and have been saying all along about the policy of the Department of Justice to prosecute people because they are or are believed to be Communists. It is actually the policy as set forth in this release or at least that the fact has been declared to be their policy, it is still their policy, as of the time of this trial and this very proceeding in and of itself is a part of the government's policy of prosecuting people because they are believed to be Communists.

I say that this document demonstrates that, your Honor, and that therefore it is not only material but it is evidence right out of the mouth of the government to sustain the contentions which the defendants have been making throughout in these proceedings.

Mr. Carter: We object to its admissibility on the ground [98] that it is immaterial to any of the issues in the case; on the further ground that the document is not signed by the Attorney General, nor by any person. It is a mimeographed sheet. It possibly could have been some sort of a handout, some public relations man's idea of his interpretation of certain things that had happened. It is certainly not competent evidence as being any expression of the Attorney General. It doesn't tend to prove or disprove any of the issues in this case.

A further ground, the very date of the document shows that it was dated after the time when the witnesses involved here refused to answer questions and after they had been ordered to answer them.

The Court: Let me read it.

(The document referred to was passed to the court)

The Court: I think that probably the objection would go more to its weight than to its admissibility. The testimony of Mr. Wirin, if given to that effect, would have warranted the inference that he did receive it from somebody in the Department of Justice. It is not signed. There is no indication that



this is the viewpoint of the Attorney General of the United States, nor of the particular head of the Department charged with the enforcement of criminal laws.

In any event, the document will be admitted into evidence. [99]

(The document referred to was marked Defendants' Exhibit B and received in evidence.)

## DEFENDANTS' EXHIBIT B

June 15, 1949

### Some Activities of the Department of Justice in the Field of Internal Security

The activity of the Department of Justice against communist subversion has struck through action in the Federal courts, through deportation proceedings, and through such legislation as the Alien Registration Act and the Foreign Agents Registration Act. The program functioned administratively inside the government through President Truman's Government Employee Loyalty procedure, which ferreted out any disloyal government employees.

Prosecution action in the courts against communists in the United States was as follows:

Eleven top-flight communists are now on trial before a jury and Judge Harold R. Medina in the Federal Court for the Southern District of New York. Charged with conspiracy to overthrow the Government of the United States by force and violence they are: Benjamin J. Davis, Jr., New York

## Defendants' Exhibit B—(Continued)

City Councilman; John Williamson, Eugene Dennis, the party's general secretary; Jack Stachel, educational director; John Gates, editor, *The Daily Worker*; Gus Hall, Chairman, Ohio Communist Party; Gilbert Green, Carl Winter, Robert Thompson, Harry Winston, Irving Potash.

All are members of the Communist National Board which is the party's high policy making politbureau.

William Z. Foster, head of the Communist Party, is under indictment with his eleven comrades, but has been declared too sick to undergo trial at this time.

Thirty-four alleged communists have been convicted in Washington for contempt of Congress.

Twenty-nine of them are out on bond, appeals to the higher court pending. Five paid fines of \$500.00 each and received suspended sentences. Seventeen of them were members of the Barsky Antifascist Refugee Committee, 10 were Hollywood script writers.

Sixteen alleged communists have been convicted in California on charges of civil contempt for refusing to testify before a Federal Grand Jury. Fifteen are out on bond, pending appeal to higher courts, and one was fined and paid \$2500 for refusing to answer subpoena, thereby obstructing justice. He will be summoned to appear before the Grand Jury again. Conviction of 10 of these 16 has been affirmed by the 9th Circuit Court of

## Defendants' Exhibit B—(Continued)

Appeals in San Francisco. The appeals of the other 5 to the Circuit Court are pending.

Seven alleged communists were convicted in Denver, Colorado, on charges of contempt for refusing to testify before the Federal Grand Jury in connection with the investigation of the alleged disloyalty of a government employee. They are out on bond pending an appeal to the Circuit Court.

The Department of Justice struck at communist disloyalty and subversion among government employees through the President's Employee Loyalty Program launched on March 21, 1947. The FBI checked over 2,471,000 incumbent and appointee forms. Of these 8,708 were set aside because of derogatory information for full field investigations, 5,459 being incumbents and 3,249 appointees. This is one third of one per cent. Director J. Edgar Hoover, of the FBI, reported that since the inception of the Loyalty Program 2,462,013 employee loyalty forms marked "No Disloyal Data" have been returned to the Civil Service Commission for transmittal to the employing agencies, an extraordinary evidence of the overwhelming high proportion of government employee loyalty.

Of those government employees under investigation some left the service while the investigation was under way. Others were found ineligible to continue on the government payroll and were dismissed. Some are being prosecuted for giving false statements to the FBI.

Defendants' Exhibit B—(Continued)

As the result of the President's Loyalty Program sufficient evidence to warrant prosecution in the federal courts was found against seven federal employees.

These cases are:

Carl Marzani, Department of State employee, convicted of giving false statement in connection with his employment, and now serving a jail sentence of from one to three years, his case having been carried to the Supreme Court which sustained his conviction.

Verne Wasley Howard, employed by the Government as an aircraft mechanic at Lowry Field Army Air Base, Denver, Colorado. He pleaded guilty to making false statements to the FBI about his membership in the Communist Party, and was sentenced to six months in jail.

Now under indictment and awaiting trial for allegedly making false statements in connection with their employment are:

Bertram Schaeffer, a postal clerk, indicted in Philadelphia.

Rafael Baroana, Agriculture Department employee, indicted in San Francisco.

Robert Edgar Himmaugh, Department of Commerce employee, indicted in New Orleans.

Alger Hiss, former State Department employee, has been indicted for perjury in New York City and now on trial on evidence growing out of the Federal Grand Jury investigation.



## Defendants' Exhibit B—(Continued)

Judith Coplon, Department of Justice employee, has been indicted and is now on trial in the District of Columbia for espionage and for taking government documents, and is scheduled to go on trial in New York for conspiracy to commit espionage and other charges.

The most recent action by the Department of Justice was taken against Harry Renton Bridges, Henry Schmidt and J. R. Robertson, in San Francisco, where a Federal Grand Jury returned a criminal indictment against them. Bridges is alleged to have fraudulently denied he was a member of the Communist party when he sought naturalization as a citizen of the United States. Schmidt and Robertson are alleged to have testified falsely in support of Bridges' petition knowing of his communist affiliations. The United States Attorney in San Francisco also filed a civil suit against Bridges for the purpose of revoking and setting aside the order which admitted him to citizenship and cancelling his certificate of naturalization on the ground of fraud.

In addition to prosecutive action, the Department of Justice has for several years been carrying out deportation proceedings against aliens suspected of subversive tendencies.

As of April 15, 1949, there were 3,278 undesirable aliens in the United States, most of them communists who cannot be deported to the countries of their nationality because of passport refusals of



## Defendants' Exhibit B—(Continued)

their own government. Of this number 2,147 are deportable to countries behind the iron curtain. Of the latter group 2,079 entered the United States prior to 1933. All the top-notch communists came into the United States before the first administration of Franklin Delano Roosevelt, arriving during the Harding, Coolidge or Hoover periods. Now under President Truman they are being shipped back as fast as law and visa conditions permit. Some have been deported. Gerhardt Eisler fled. Others deported by stipulation, and still others are to go within the next few weeks.

Alexander Stevens, alias J. Peters, who recently flew to Hungary following the issuance of a deportation warrant, and who was described by the 80th Congress House Un-American Committee as "the brains of the entire communist underground in the United States" was allowed to enter the country in 1925 during the Coolidge regime. He left, and was allowed to return in 1928 under the Hoover administration. Other high command communists who entered the country during the 20's and up to 1933 were: Claudia Jones, member of Young Communist League, State Educational Director and State Chairman of the National Council of the Young Communist League, and also member of International Committee Communist Party, entered in 1924; Alexander Bittleman, member of National Committee of Communist Party and active writer on behalf of Communist Party entered in 1912 when

## Defendants' Exhibit B—(Continued)

Taft was President, left and came back again in 1931 under the Hoover administration; Charles A. Doyle, active member of Communist Party, entered in 1923; John Santo, who was ordered deported and left the country on June 10, 1949, long member of Communist Party, entered in 1927 during the Coolidge days; Jack Stachel, National Board Member and Educational Director of the Communist Party, entered in 1931, when Hoover was President.

Sixty-eight undesirables entered between 1933 and 1945, and none has entered since Attorney General Clark assumed his post. In addition to the deportation cases as of March 31, 1949, Attorney General Clark had under investigation the cases of 389 naturalized citizens for the purpose of determining whether steps should be taken to cancel or revoke such citizenship because of suspected subversive activities. At the present time the Attorney General has under investigation through the immigration service looking to deportation or under actual deportation proceedings the cases of 833 aliens who, *prime facie*, are deportable under the Act of October 16, 1918, as amended.

On February 5, 1948, the Attorney General recommended legislation to the House Un-American Activities Committee so that deportable aliens might be detained in custody while they negotiate for documents for entree into countries willing to receive them. He also asked for amendments to the Foreign Agents Registration Act, the Voorhis Act,

## Defendants' Exhibit B—(Continued)

The Smith Act and the Alien Registration Law. But the 80th Congress failed to act. There is now before the 81st Congress a bill which, if enacted into law, would go far to correct this situation. Attorney General Clark advised the Committee that such a plan would also give the Department of Justice an opportunity to curb their activities.

Among the notorious deportees and others obliged to leave the country were: William Bigelow, a Canadian, March 30, 1948; Emil Gardos, a Rumanian, April 1948; Badrig Selian, a Russian, May 18, 1948; Hans Eisler and Sam Carr departed on March 26, 1948 and February 11, 1949, respectively; John Santo of the Transport Workers Union, June 10, 1949. Other communists ordered to leave the country and who are scheduled to depart in a few days are: Ferdinand T. Smith of Jamaica; Cando Dimitroff, a Bulgarian; and Gustav Johnson of Sweden.

The record discloses deportation proceedings brought by the Department of Justice against prominent communists as far back as 1933 when the Roosevelt Administration came into office. There were twenty-five cases in which important communists were prosecuted for offenses against the United States. Most of these prosecutions have been for passport violations or other by-product offenses arising out of Communist activities, these being the only cases provable against them. Among the twenty-five may be named Charles Krumbein, one time New York State Secretary of the Com-

## Defendants' Exhibit B—(Continued)

munist Party and member of the Political Committee of the Communist Party U.S.A.; Nicholas Dozenberg, Mikhail N. Gorin, Welwel Warzower, who is also and better known as Robert William Weiner, one time head of the International Workers Order and member of the Communist Party National Committee; Philip J. Jaffee, Allen E. Blumberg, and Earl Browder, the then top man of the party in the United States.

In addition the Attorney General, after an exhaustive and thorough investigation, has listed a total of 159 organizations in the United States as hostile and inimical to our government and our way of life.

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The Court: Proceed.

Mr. Margolis: The defendants rest.

The Court: Rebuttal?

Mr. Goldschein: None, may it please the court.

The Court: The government rests?

Mr. Carter: The government rests.

The Court: Very well. [100]

\* \* \*

The Court: I think that is about as broad as any statement of immunity can be made, if that is your point, that it [106] is not broad enough.

Mr. Margolis: That is one point, your Honor, and I want to state again, if your Honor will look at the Counselman case and the Brown case once



## Defendants' Exhibit B—(Continued)

more, your Honor will find that the immunity must be against prosecution concerning the subject matter of the testimony, not as the result of anything which the testimony will lead to.

The Court: I do not see how he could have said it any clearer.

Mr. Margolis: What he could have said is, that you are going to be asked to testify concerning the subject, that you cannot be prosecuted with respect to the subject concerning which you testify. You simply cannot be prosecuted with respect to that subject, and the immunity we ask has to be so broad that even if they obtain the lead from some other place, other than this defendant, there can be no prosecution. That is what the cases hold, and some of the earlier statutes which didn't go that far were held to be insufficient.

However, whether or not your Honor holds——

Mr. Goldschein: May I interrupt just a moment, please, sir?

May it please the court, so that the court will understand exactly what it was intended to do, that was the exact intent and purpose of the offer, that the witness would not be prosecuted. [107]

The Court: I understand the language. It seems to me that it is as broad as it could be made.

Mr. Margolis: I assume that this is not an addition to the record, that this is merely a statement of counsel.

The Court: In explanation of what he intended to say, but the words stand by themselves.



It seems to me that they are as broad as they can be made. You cannot offer anybody immunity from every possible crime which he might have committed in the past or which he might commit in the future.

Mr. Margolis: But you can offer them immunity from being prosecuted concerning the subject on which they testify.

The Court: I think his offer is broad enough for that.

Mr. Goldschein: And in addition, may it please the court, if there was any misunderstanding about that question and the witness now wants to take the witness stand in this court, with permission of the court, and testify to the facts that she refused to answer before the grand jury, and will answer all questions, the offer still stands good.

The Court: As to the subject matter?

Mr. Goldschein: As to the subject matter.

The Court: Go ahead.

Mr. Carter: Or to testify before the grand jury, to signify intention to testify before the grand jury, if they didn't want to testify publicly in court.

The Court: I have pending before me these criminal informations. I take it that your offer of immunity now means that in the event that the witness—is that made to each one of these witnesses?

Mr. Carter: It is made to each witness and in substance the offer is this: If there has been any misunderstanding on the part of the witness and the witness signifies his intention of appearing be-

fore the grand jury and answering these questions based upon the offer of immunity, the United States Attorney would move this court, subject to the court's approval, to terminate these proceedings on contempt.

The Court: To dismiss them?

Mr. Carter: To dismiss the contempt, so we will have the record clear as to what our intention was.

The Court: Do you understand it now, Mr. Margolis?

Mr. Margolis: I understand what they are saying, but I don't think it changes the situation any.

The Court: Do you wish an opportunity to confer with your clients at this time?

Mr. Margolis: No, your Honor. I merely desire to go on with my argument.

The Court: They are the ones who are involved. I think that I should give you an opportunity to speak to each one of them.

Mr. Margolis: I want to say this, your Honor, that I [109] would advise them against this in any event.

The Court: I do not want you to tell me what you are going to advise them. You can tell me afterwards.

Mr. Margolis: It is a useless thing, your Honor.

The Court: Mr. Margolis, you have been standing at the lectern, your clients have been sitting at the table, you have not had an opportunity to speak to them since the statement of the offer made by the United States Attorney, and they have not had an opportunity to communicate with you. So I

do not see how anybody can state it is a useless thing.

I will give you an opportunity to consult with them privately. I will make a room available for you. [110]

\* \* \*

June 24, 1949; 10:00 o'Clock A.M.

(Other court matters.)

The Court: In the matter of Cases Nos. 20743, 20744, 20745, 20746 and 20747, United States v. Appelman, Averbuck, Greenfield, Healey and Newman, the defendants are all present in person as well as by counsel.

Yesterday evening when we were discussing just at adjournment and prior to it the various executive orders, with the aid of the United States Attorney's office who apparently came to the court with a number of the documents, I have gathered them together. I have had photostats made of all those and I have the black photostats and will furnish to each counsel—they should be finished shortly—white photostats of each of these documents which I will now enumerate, and of course of which I can take judicial notice but which, for the purpose of the record, it may be well at this point to indicate what they are.

The first one is Executive Order 9300, published in 8 Federal Register 1701, promulgated by President Roosevelt on February 5, 1943, and entitled, "Establishing the Interdepartmental Committee to Consider Cases of Subversive Activity on the Part of Federal Employees."

The next one is Executive Order 9806, published in 11 F. R. 13863, promulgated November 25, 1946, by Harry S. Truman, [141] President of the United States, and entitled, "Establishing the President's Temporary Commission on Employee Loyalty."

The next one is Presidential Directive Published in 13 F. R. 1359, promulgated on March 13, 1948, by Mr. Truman, the President, and entitled, "Confidential Status of Employee Loyalty Records, Memorandum to All Officers and Employees in the Executive Branch of the Government."

The next one in point of time is a report of the Loyalty Review Board filed March 19, 1948, 8:54 a.m., and signed "The Loyalty Review Board, United States Civil Service Commission, Seth W. Richardson, Chairman," published in Volume 13, No. 56, pages 1471 to 1473 of the Federal Register of March 20, 1948.

Immediately following that, Executive Order No. 9835, published in 12 F. R. 1935 was promulgated by President Truman on March 21, 1947. Incidentally, it indicates that Executive Order No. 9800 of February 5, 1943, is hereby revoked. That was the previous executive order mentioned.

The title of Executive Order No. 9835 is, "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government."

The next in point of time is found in the Federal Register Volume 13, No. 206, published October 21,

1948, pages 6135, 6136, 6137 and 6138. It is entitled: "Title 5, Administrative Personnel, Chapter II, The Loyalty Review [142] Board, Part 210, The Operations of the Loyalty Review Board," and is signed by that board of the United States Civil Service Commission by Seth W. Richardson, Chairman, and was filed with the Federal Register October 20, 1948.

And the last one is found in Volume 14, No. 88, of the Federal Register at pages 2369 to 2371 and 2372, of the Federal Register published Saturday, May 7, 1949. It is entitled: "Title 5, Administrative Personnel, Chapter II, The Loyalty Review Board, Part 200, Statement of the Loyalty Review Board, Part 210, The Operations of the Loyalty Review Board, Part 220, Directives to Departments and Agencies; Cases of Incumbent and Excepted Employees and Excepted Applicants, Part 230, Directives to Regional Loyalty Boards; Cases of Applicants and Appointees in the Competitive Service," and is signed by The Loyalty Board, United States Civil Service Commission, Seth W. Richardson, Chairman, and was filed with the Federal Register May 6, 1949.

Incidentally, I have examined those.

You may proceed. [143]

\* \* \*

The Court: Is there any legal reason why sentence should not be pronounced?

Mr. Margolis: None other than those that have been previously stated.



The Court: Mr. Appelman, it is the judgment and sentence of the court that you be committed to the custody of the Attorney General for the period of one year. You will stand committed. [248]

\* \* \*

Is there any legal reason why sentence should not be pronounced?

Mr. Margolis: None, your Honor, other than those stated.

The Court: It is the judgment and sentence of the court, Mr. Averbuck, that you be fined the sum of \$10, and you will stand committed until paid.

\* \* \*

Is there any legal reason why sentence should not be pronounced?

Mr. Margolis: None other than that which has previously been stated, your Honor.

The Court: Mr. Greenfield, I am almost your age and it is a little difficult sitting here on this side of the bench to pass sentence in judgment upon some one of my own generation on the other side. But after all I have my oath and you have your beliefs. You are following your beliefs and I [264] am following my oath. I found you guilty of contempt and I cannot do anything else than to treat you just the same as everybody else.

It is therefore the judgment and sentence of the court that you be committed to the custody of the Attorney General for the period of one year. The defendant will stand committed. [265]

\* \* \*

Mr. Margolis: In the matter of United States v.

Alvin Abram Averbuck, No. 20744, during the recess I went into the Clerks' office and deposited \$10 which I ask be kept in the registry in order that the payment of this money not defeat the right to prosecute an appeal. I have the receipt here, your Honor, showing the deposit of \$10 and I ask that upon that basis that at this point Mr. Averbuck be released pending appeal.

The Court: The \$10 was deposited in the registry as against the final execution for the fine?

Mr. Margolis: That is right, your Honor.

The Court: Mr. Averbuck is discharged. [266]

\* \* \*

The Court: Any legal reason why sentence should not be pronounced?

Mr. Margolis: None other than that which has previously been stated.

The Court: It is the judgment and sentence of the court that the defendant Newman be committed to the custody of the Attorney General for one year. He will stand committed. [278]

\* \* \*

Mrs. Healey, you have been found guilty of contempt as charged in the indictment for refusal to answer the questions, and I have heretofore indicated that your contempt consists not only of refusal to answer all questions, but each question.

Now is the time for sentence, and if you have some statement to make—and I have seen you sitting there anxiously waving a paper so I guess you have some statement to make.

The Defendant Healey: "I am about to be sentenced——

The Court: Are you reading?

The Defendant Healey: I am reading it.

The Court: Very well.

The Defendant Healey: "as a criminal by this sovereign court of the United States.

"Not for any act, criminal or otherwise, which I have committed. Not for any word that I have spoken.

"I stand here charged and convicted, solely because I have refused to be a party to denial of my own constitutional rights.

"When, under the guarantees of the Fifth Amendment to the Constitution, I refused to answer questions that might incriminate me, I was mindful of the political atmosphere in our country today.

"I was fully aware of the powerful forces that are using such men as Mr. Carter to whip up the most hysterical witch-hunt in our country's history.

"In the process of that witch-hunt, precious traditions are being destroyed. Working men and women in factories, educators in their classrooms, scientists in their laboratories are the hourly victims of the hysteria which Mr. Carters all over the country obediently are whipping into a fury.

"Nor is the end product which is designed to come out of this witch-hunt any more obscure than are the real purposes of the U. S. Attorney.

“Powerful masters of monopoly, by desperate means, seek to force upon every American servile acceptance of an ideology truly foreign to the traditions of the American people—the ideology of Fascism.”

Your Honor quoted Mark Twain here earlier, but I would like to quote another statement from Mark Twain which I think is probably more pertinent to the issues before our entire [280] country today. In his book “A Connecticut Yankee in King Arthur’s Court,” he gave an American answer to the question of loyalty, and I quote:

“‘You see, my kind of loyalty was loyalty to one’s country, not to its institutions or its office-holders. The country is the real thing, the substantial thing, the eternal thing; it is the thing to watch over, and care for, and be loyal to; institutions are extraneous, they are its mere clothing, and clothing can wear out, become ragged, cease to be comfortable, cease to protect the body from winter, disease and death.

“‘To be loyal to rags, to worship rags, to die for rags—that is a loyalty to unreason; it is pure animal; it belongs to a monarchy, was invented by monarchy: let monarchy keep it. I was from Connecticut, whose constitution declares “that all political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit; and that they have at all times an undeniable and indefeasible right to alter their form of government in such a manner as they may think expedient”.’”

That is the end of the quote.

The Court: Are you trying to alter it now by your refusal [281] to answer these questions?

The Defendant Healey: I don't think so. I am trying to uphold the Constitution.

The Court: Is that your point?

The Defendant Healey: Obviously not, your Honor.

The Court: Very well. Then go ahead.

The Defendant Healey: "Monopoly capital seeks to supplant the guarantees of the Constitution with their doctrine that loyalty to country means abject loyalty to the greed and exploitation of their monopolistic ends.

"They would permit the educator and the scientist——"

The Court: Who is "they"?

The Defendant Healey: Monopoly capital, and I would be glad to enumerate some of those institutions in this country.

The Court: Go ahead. Are they people?

The Defendant Healey: American people, although the people, as Mr. Newman pointed out, are unimportant, they are important in so far as they represent entrapped capital in this country.

The Court: Go ahead.

The Defendant Healey: Chase National Bank, Dillon, Reed & Company.

The Court: Who are the people? [282]

The Defendant Healey: I think maybe your Honor will remember that only just recently an



associate of Dillon, Reed & Company was part of the Cabinet in the United States Government and probably everybody here remembers that it was during his policies there, which were not any different from the policies of the Truman bipartisan plank that Mr. Forrestal reigned there, as he did during the period of the war when he represented Dillon, Reed & Company's investments.

General Motors, General Electric—I think probably, your Honor, that it would be a great pleasure to be able to provide for your Honor in more detail form than I am prepared to do here this morning, a tabulated list, not only of the corporations, a very small number of whom control the most tremendous wealth of this country, but the individuals who help to develop the policies of those corporations.

The Court: You shall have the opportunity.

The Defendant Healey: May I?

The Court: You shall.

The Defendant Healey: I will be delighted to do so.

The Court: You shall have the opportunity to have that delight.

The Defendant Healey: Thank you.

“They would permit the educator and the scientist to explore only those ideas and concepts that would be safe for the preservation of their financial oligarchies and industrial cartels.” [283]

The Court: When you say “they,” you are speaking about those same “theys”?

The Defendant Healey: I am still speaking of

the most dangerous and most powerful forces in history.

The Court: You speak about "they"?

The Defendant Healey: That is right, "they," the monopolists.

The Court: After all, you see you are up here for sentence, and you are talking about "they," but I have got "you" to think about. But go ahead.

The Defendant Healey: "Finally, they would require"—"they" referring again to the same institutions and forces—"of every citizen blind submission to the supreme test of their brand of loyalty—the willingness of each American to die in atomic war for their filthy profits.

"This is the real reason for the hysterical witch-hunt that sweeps America today. I cannot be less mindful that it is the reason why I am being haled before this court than I am that it is the reason for the mockery of a trial which goes on in Foley Square, New York."

The Court: You are here because you refuse to answer questions. If there is any doubt in your mind, Mrs. Healey—I mean, you appear to be a very intelligent woman—it is [284] not because "they," who these "theys" are, it is because you refuse to answer questions which I held you should answer. That is the reason you are here.

The Defendant Healey: And as I have indicated, your Honor, it is my opinion that the refusal to answer those questions is the only way to guarantee the Fifth Amendment to the Constitution.

That is the reason why our forefathers thought it was necessary to protect it in writing for the generations to come. They were conscious also, your Honor, of the fact that small groups of people can whip up for their own greed and their profits, because it is not a new thing in world history, the type of hysteria which is going on today.

The Court: Who is trying to whip up something for greed and profit in connection with this grand jury investigation? You keep talking about "they." After all, this is a grand jury investigation concerning the loyalty of government employees. Let us come back to that and keep on the subject.

The Defendant Healey: I wish that the government had been able to stick to the subject of loyalty of Federal employees, your Honor.

"Here, in this court, I am told that admission of a belief in and advocacy of economic theories repugnant to American monopolists will not place me in jeopardy. In New York, the same Department of Justice demands conviction and imprisonment of 12 [285] men for no other crime than the belief in and advocacy of those selfsame theories.

"I have always been willing to risk my personal safety for that cause which will result in the liberation of all mankind. I am a daughter of the working class, and as such I have tried, as best I might, to serve the working class. As long ago as 1930——"

The Court: Do you think you are the only daughter of the working class?

The Defendant Healey: No, I am not. I am very

proud of being only one of millions who believe in and serve that same working class.

The Court: A lot of other people are born of the working class besides you.

The Defendant Healey: Correct, sir.

The Court: Go ahead.

The Defendant Healey: "As long ago as 1930 that meant being imprisoned for participating in demonstrations in support of unemployment insurance, a demand that in those days was characterized as foreign agitation, as Red propaganda.

"I participated in the organization of migratory field workers, and for a number of years faced the vigilante actions of the Associated Farmers [286] and their police minions in many agricultural and cannery strikes. In 1934, in the Imperial Valley, I served six months in jail for the crime of aiding a strike of field workers who demanded 15 cents an hour, an increase of 5 cents over their prevailing wage.

"It was not only police terror, vigilante actions and jails which I met in that period of early industrial organizations. I slept on benches in union headquarters, and went without meals in order that every precious penny might go for union application cards, buttons and leaflets.

"During subsequent years when I serves as an International vice president of the CIO union and later as an International representative for another, I was continuing that same pattern of my life, to help in every way the ceaseless struggle of



the working class against the ruthless brutality of this economic system.

“I am the mother of a six-year-old child, and like any mother, I am heartsick at the prospect of being forcibly separated from him. And yet, my child, young as he is, understands that because of my love and concern for him and the children of all mothers, I cannot and will not compromise now with [287] the forces that would deny him security and decent opportunity in life. I have tried to explain to him what was aptly said by Franklin Delano Roosevelt in 1941:

“‘What we face is nothing more or less than an attempt to overthrow and to cancel out the great upsurge of human liberty of which the American Bill of Rights is the fundamental document; to force the peoples of the earth, and among them the peoples of this continent, to accept again the absolute authority and despotic rule from which the courage and the resolution and the sacrifices of their ancestors liberated them many, many years ago.

“It is an attempt which could succeed only if those who have inherited the gift of liberty had lost the manhood to preserve it. But we Americans know that the determination of this generation of our people to preserve liberty is as fixed and certain as the determination of that earlier generation of Americans to win it.—

The Court: Are you still quoting?

The Defendant Healey: I am still quoting, your Honor.



The Court: Quoting Roosevelt is like quoting the Bible. You can get almost any kind of a quotation you want to from him. Proceed. [288]

The Defendant Healey: All great Americans in American history, when they represented the aspirations of the common people, could be quoted at any time.

“ ‘We will not, under any threat, or in the face of any danger, surrender the guarantees of liberty our forefathers framed for us in our Bill of Rights.

“ ‘We hold with all the passion of our hearts and minds to those commitments of the human spirit.

“ ‘We are solemnly determined that no power or combination of powers of this earth shall shake our hold upon them.’

That is the end of the quote.

“The economic system of the monopolists is cracking and sagging in new and increasing places. Unable to solve the contradictions inherent in this system, faced with another impending depression, the ruling class seeks to plunge our country into a new and even more terrible war——”

The Court: Which is the ruling class?

The Defendant Healey: The class which controls the means of production.

The Court: It seems to me like the Democrats did pretty well last time.

The Defendant Healey: Well, I think your Honor would find I am not speaking here about political parties, because [289] in my opinion the Democratic Party and the Republican Party represent that same class.

The Court: They are both wrong?

The Defendant Healey: I said they represent that same class which controls the means by which human beings live, who control the means by which human beings will be able to feed their children. The ruling class seeks to plunge our country into a new and even more terrible war, in an attempt to bolster their slumping markets and extend their exploitation over more and more peoples.

“Determined on a policy of world conquest, American monopolists are trying to guarantee that the people will be ready to die for this sordid cause. They cannot come before the people and openly proclaim the holiness of such sacrifice. Desperately they attempt to prevent the people from understanding the real situation. When Americans understand that it is not inevitable that their lives and their liberties should be destroyed in order to pile up new profits for these rules, they would refuse to be so sacrificed. Therefore, organizations and individuals who would expose the real causes of depressions and of war, must be destroyed by this ruling class. The brunt of their attack falls today upon the Communist Party. Tomorrow the existence of [290] free trade unions and all independent organizations become intolerable to the war-makers.”

The Court: Who are the war-makers?

The Defendant Healey: The war-makers, your Honor, are those who control the means of production in this country, who control the factories, the mines, the mills, the steamships—all those things.

The Court: They are the war-makers?

The Defendant Healey: That is correct.

The Court: I see.

The Defendant Healey: "A whole economic system is in the process of decay. History proclaims that once the process of decay has started a new system of society must replace the old. There is no way of saving that dying system. And all the stool-pigeon systems of a J. Edgar Hoover, all the maneuvers of a Harry Truman or his Republican counterparts, all the war attempts of a U. S. Steel Corporation will not save it."

The Court: Will not save what?

The Defendant Healey: The dying, outmoded economic system, your Honor.

The Court: You mean the United States of America?

The Defendant Healey: I do not, sir; I mean the capitalist system which is not synonymous with the United States of [291] America.

The Court: I see.

The Defendant Healey: As a matter of fact, I think your Honor will find another quote from the former President in which he says that democracy is not static, life is not static, all things change, progress and decay.

The Court: Yes, that is right.

The Defendant Healey: And after decaying, must give way to the new.

The Court: I remember that, Mrs. Healey, and I remember well that he once said that anybody who

was not a Socialist when he is 20 has something wrong in his heart; if he is still a Socialist when he is 40 there is something wrong with his head.

The Defendant Healey: I don't think that that was original with him.

The Court: I don't think so either.

The Defendant Healey: I think that was said many years before by those who would attempt to explain why renegades can flourish so in this kind of a system.

"Eventually and ultimately, this system, like all previous outmoded systems will be replaced by one designed to let man live secure and free.

"The jailing of five more people in Los Angeles will not change this fact." [292]

The Court: Mr. Margolis, do you have anything more to add?

Mr. Margolis: I have nothing to say.

The Court: Mrs. Healey, do you have anything more to add?

The Defendant Healey: No. [293]

\* \* \*

The Court: Is there any legal reason why sentence [294] should not be pronounced?

Mr. Margolis: None other than that which has previously been stated.

The Court: Mrs. Healey, I have listened to your statement with a great deal of interest. I have no doubt but what you believe it. But, as I have resolved its inferences and its absent statements, it has been an almost complete defiance to the whole



system of government and law and order. I would be remiss as a man if I did not recall that since last October 25th there has been an effort to ascertain who has kept the books and records of the Communist Party of Los Angeles, or the County Committee of the Los Angeles Communist Party, or whatever the name is. I would be unfaithful to my profession as a lawyer if I did not take cognizance of the fact that in this whole inquiry the purpose has been to ascertain who you are, where you live and where the books and records are. At last, after months of effort, you are finally produced. You refuse to produce any books and records, you refuse to answer any questions, you refuse to give any information and, finally, after you are found guilty after a very considerable deliberation you stand there and make a defiant statement which to me can be construed as nothing else but a defiance to the whole system and structure of government.

I suppose that it is unusual to impose any sentence of [295] any length of time upon a person for contempt of court, but I feel that I must impose upon you a sentence and judgment, which it now is, that you be committed to the custody of the Attorney General for a period of 18 months, and will stand committed.

Court is adjourned.

\* \* \*

Mr. Margolis: Your Honor please, at this time on behalf of the defendants Healey, Greenfield,



Newman and Appelman I hereby renew and make an application for bail pending appeal. I advise the court that we intend to prosecute the appeal diligently. We will order a transcript prepared immediately [296] and proceed as rapidly as the physical requirements of doing the job will permit. As a matter of fact, we are inclined to ask the Appellate Court if they haven't decided the other cases that are pending to consolidate these cases with the other ones, if we can get them up there quickly enough. We will try.

I say, your Honor, in view of the fact that in three other sets of cases the appellants, under very similar circumstances in cases raising similar questions of law and fact, bail has been granted. I submit that that warrants and requires the granting of bail in this case.

The Court: Counsel, I think I have indicated that I cannot see much difference between my views as I have expressed them—I have tried to analyze them as carefully as I can—and I do not see any substantial question on appeal.

Mr. Margolis: However, the Court of Appeals has ruled that there is.

The Court: That is their business.

Mr. Margolis: Your Honor please, that is the Court of Appeals, and they have that right to reach a different conclusion than you do. However, the precedent of the Court of Appeals is certainly binding upon this court, and here is precedent——

The Court: No, no. [297]

The Court: What is the number of the rule, counsel?

Mr. Margolis: I beg your pardon?

The Court: What is the rule number?

Mr. Margolis: On the right to grant bail?

The Court: Yes.

Mr. Carter: I think it is 46. I am not sure, your Honor.

Mr. Margolis: I don't know.

The Court: 46 is the right to bail generally and not on appeal.

Mr. Margolis: I don't remember the number, your Honor. I don't have the briefs here on that point. [299]

Mr. Carter: The appeal section starts in 30, if I recall, 33 or 34.

The Court: I have the rules here but I do not find the particular rule.

Mr. Margolis: Does your Honor have the criminal rules?

The Court: Yes, the criminal rules.

Mr. Margolis: It is 46(a)(2), your Honor. It is on page 40 of this document.

The Court: I have it. [300]

\* \* \*

Mr. Margolis: If your Honor please, let's assume that a decision came down exactly contrary to your Honor's ruling. Then your Honor would have——

The Court: That might be different.

Mr. Margolis: Then your Honor would be bound to follow that, no matter how much he believed

that that decision was wrong.

The Court: Just as was the situation in the Newman case. There there was a substantial question and I recognized it instantly and granted bail. But here I cannot see it. [301]

\* \* \*

Mr. Margolis: May I make this supplemental motion then, your Honor?

We intend to apply to the Appellate Court as quickly as possible for a stay there. No harm is going to be done to anybody. This is a criminal case. These are definite sentences. No harm will be done to anybody, particularly in view of what your Honor must recognize as the likelihood of what will happen here in view of what the Court of Appeals has done before, that we be given a reasonable time to apply to the Appellate Court for a stay and that bail be granted just for that reasonable time.

The Court: Do you object?

Mr. Goldschein: Yes, sir.

The Court: The United States Attorney objects to it.

Mr. Margolis: If your Honor please, is the United States Attorney to determine what should be done in this case?

The Court: I am just asking if he consented. If he did consent then nobody could object, but he does object to it.

Mr. Margolis: If your Honor please, it seems to me that [302] this should be determined upon the

question of whether or not it is a reasonable request.

Will Mr. Goldschein stand up here and say to this court that he doesn't think the Court of Appeals will grant bail?

Mr. Goldschein: Mr. Goldschein will say that. I am saying so now.

Mr. Margolis: Then it is a hypocritical statement, and he knows it.

Mr. Goldschein: I am the only honest man in the room.

Mr. Margolis: It is between you and me.

The Court: Counsel, Mr. Margolis and Mr. Goldschein, if you want to go up to the jury room privately we will let you two go up together, and you can settle your difficulties there, that kind that you are talking about now.

The point is whether or not I should grant bail, and that is determinative as to whether or not in my judgment there is a substantial question. Counsel, I cannot see it. Maybe unanimously the Appellate Court will disagree with me——

Mr. Margolis: They have already, your Honor.

The Court: ——but the United States Attorney objects to granting bail and I see no reason why these people, who have been found guilty of an offense, should be treated any differently than any other persons, hundreds and hundreds of whom come up before me, and are found guilty, and they think [303] they ought to have a right to appeal too.

Mr. Margolis: I venture, your Honor, that never in the history of court procedure has there been a denial of bail under these circumstances. I know

of no situation in which the precise question of law and fact has been determined to be substantial by the Appellate Court and the District Court has denied it.

The Court: Have you concluded?

Mr. Margolis: Yes, I am finished, your Honor.

The Court: The motion is denied. The defendants are committed. Court is adjourned.

(Whereupon, at 5:40 o'clock p.m., court was adjourned.) [304]

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### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of June, A.D., 1949.

/s/ AGNAR WAHLBERG,

Official Reporter.

[Endorsed]: No. 12283. United States Court of Appeals for the Ninth Circuit. Dorothy Ray Healey, Max Appelman, Alvin Abram Averbuck, Elvador G. Greenfield, and Horace Morton Newman, Jr., Ap-



pellants, vs. United States of America, Appellee.  
Transcript of Record. Appeal from the United  
States Circuit Court for the Southern District of  
California, Central Division.

Filed August 9, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals for the  
Ninth Circuit

No. 12283

DOROTHY RAY HEALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

HORACE MORTON NEWMAN, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ELVADOR G. GREENFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MAX APPELMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ALVIN ABRAM AVERBUCK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANTS INTEND TO RELY ON  
APPEAL

1. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that under the Fifth Amendment to the Constitution of the United States appellants had the right to refuse to answer said questions on the grounds that answers to said questions might tend to incriminate them.

2. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that said questions and said orders of the Court were

directed to possible membership in or affiliation with, the Communist Party, a political organization, and said questions and the respective orders of the Court interfered with, obstructed, coerced and abridged their exercise of the rights and duties of political expression through speech, press, assembly, association and petition, in contravention of the First Amendment to the Constitution of the United States.

3. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that said questions and said orders of the Court were directed to the compulsory disclosure by appellants of their association or affiliation, or the absence thereof, with the Communist Party, a political organization, or officers or members thereof, and thereby violated the right of each appellant to privacy and silence in such matters, in contravention of the First, Fourth and Fifth Amendments to the Constitution of the United States.

4. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that said questions and said orders of the Court were directed to the compulsory disclosure by appellants of their association or affiliation, or the absence

thereof, with the Communist Party, a political organization, or officers or members thereof, and thereby interfered with, obstructed, coerced and abridged their exercise of their governmental powers reserved to the people under the Ninth and Tenth Amendments to the Constitution of the United States.

5. The Court below erred in ordering appellants to answer the questions put to them before the Grand Jury and in sentencing appellants for contempt for their refusal to answer said questions in that said Grand Jury was not conducting a bona fide investigation but was carrying out a scheme, plan and design to harass and annoy appellants because they were believed to be members of the Communist Party, a political organization, and discriminately to apply the laws of the United States against appellants in such a manner as to impose punishment upon them solely and exclusively for the reason that they were believed to be members of said Communist Party.

6. The Court below erred in refusing to hear and to take evidence upon the appellants' challenge to the composition and selection of the Grand Jury.

7. The Court below erred and denied appellants due process of law in contravention of the Fifth Amendment to the Constitution of the United States in refusing to receive evidence upon, and refusing offers to prove facts supporting each of the points specified above.

8. The Court below erred and denied appellants

due process of law in contravention of the Fifth Amendment to the Constitution of the United States in quashing a subpoena directed to Tom C. Clark, Attorney General of the United States.

Dated: July 13, 1949.

MARGOLIS and McTERNAN,  
By /s/ JOHN T. McTERNAN,  
Attorneys for Appellants.

Service of the within Statement of Points Upon Which Appellants Intend to Rely on Appeal and receipt of a copy thereof is hereby admitted this 14th day of July, 1949.

JAMES M. CARTER,  
United States Attorney,  
Attorney for Appellee.  
By M. DeSHAINÉ.

[Endorsed]: Filed Aug. 9, 1949.

---

[Title of Court of Appeals and Causes.]

### STIPULATION

It is hereby stipulated and agreed by and between appellants, by their counsel of record, and appellee, by its counsel of record, that those portions of the Record on Appeal herein referred to in paragraph numbered 3 of appellants' designation of Record on Appeal shall consist of the printed Transcript of Record in four volumes heretofore filed with the above entitled court in case No. 12217, Samuel Harry Kasinowitz, appellant, v. United States of



America, appellee, and consolidated cases, and case No. 12221, Lillian Adele Doran, appellant, v. United States of America, appellee, and consolidated cases; and that, said printed Transcript of Record being on file in the above entitled court, it will not be necessary for appellants or appellee to make any further or other filing thereof for the purposes of the appeal in the above entitled cause.

This stipulation shall be included in the record of the cause on appeal in this court and be incorporated in the printed Transcript of Record on said Appeal.

This stipulation is subject to the approval of the Court.

Dated: July 13, 1949.

MARGOLIS and McTERNAN,  
By /s/ JOHN T. McTERNAN,  
Attorneys for Appellants.  
/s/ JAMES M. CARTER,  
United States Attorney,  
Attorney for Appellee.

It Is Ordered that the above stipulation be approved and that the same be included in the record of the cause on appeal in this court and be incorporated in the printed Transcript of Record on said Appeal.

/s/ WILLIAM DENMAN,  
/s/ HOMER T. BONE,  
Judges, U.S. Court of Appeals  
for the Ninth Circuit.

[Endorsed]: Filed Aug. 11, 1949.

[Title of Court of Appeals and Causes.]

STIPULATION

It is hereby stipulated and agreed by and between appellants, by their counsel of record herein, and appellee, by its counsel of record herein, as follows:

1. The attached copy of the affidavit of Frank Slaby may be substituted in the Record on Appeal in lieu of the original affidavit of Frank Slaby, designated by appellants and referred to at pages 210 and 221 of the transcript of the proceedings of June 10, 11, 1949.

2. There may be physically incorporated in the printed Record on Appeal herein copies of Defendants' Exhibit "A," which are to be furnished by appellants, in order to save the expense of reprinting the same in the Record on Appeal.

3. This stipulation shall be included in the record of the cause on appeal in this court and be incorporated in the printed transcript of record on said appeal.

Dated at Los Angeles, California, this 4th day of August, 1949.

MARGOLIS and McTERNAN,  
By /s/ JOHN T. McTERNAN,  
Attorneys for Appellants.  
/s/ JAMES M. CARTER,  
United States Attorney,  
Attorney for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,  
Chief Judge.

/s/ HOMER T. BONE,  
United States Circuit Judge.

[Endorsed]: Filed Aug. 11, 1949.

---

State of California,  
City and County of San Francisco—ss.

AFFIDAVIT OF FRANK SLABY

Frank Slaby, being first duly sworn, deposes and says:

That pursuant to a subpoena served upon me, I appeared as a witness before the Grand Jury for the Northern District of California, Southern Division, in the Federal Building at San Francisco, California, on the afternoon of June 6, 1949. That after I was sworn to tell the truth, a series of questions were put to me by F. Joseph Donahue, Special Assistant to the Attorney General of the United States. That among the questions put to me by Mr. Donahue were, in substance and effect:

“Were you ever a member of the Communist Party?”

“Are you now a member of the Communist Party?”

With respect to each of these questions I stated that I refused to answer them on the ground that I might be incriminated.

After the questions were put and after I stated that I refused to answer them on the ground that I might be incriminated by answering them, Mr. Donahue said in substance and effect:

“Yes, it is quite true that he may incriminate himself and as far as I am concerned, Mr. Slaby may be excused.”

Thereupon, I was excused and left the Grand Jury Room.

The quotations above are the substance and effect of what transpired and are not necessarily the exact or literal words. The fact is perfectly clear in my memory that the questions with respect to present and past membership in the Communist Party were asked of me, that I refused to answer them on the ground that I might be incriminated, and that Mr. Donahue agreed that I might be incriminated by answering them and that I was excused from further testifying.

FRANK SLABY.

Subscribed and sworn to before me this 8th day of June, 1949.

[Seal]

AGNES QUAVE,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 14, 1953.

[Title of Court of Appeals and Causes.]

## DESIGNATION OF RECORD ON APPEAL

The Clerk will please prepare the record on appeal and include therein the following:

1. The following Reporter's Transcripts:

(a) from the proceedings on May 26, 1949:

Page 1, line 1—Page 15, line 20;

Page 37, line 20—Page 50, line 14;

Page 58, line 20—Page 80, line 11;

(b) from the proceedings on June 9, 1949:

Page 4, line 1—Page 13, line 4;

Page 37, line 17—Page 43, line 25.

Page 57, line 11—Page 59, line 5;

Page 98, line 25—Page 118, line 25;

Page 123, line 12—Page 159, line 4;

(c) from the proceedings on June 10 and 11, 1949:

Page 167, line 2—Page 195, line 7;

Page 209, line 17—Page 210, line 25;

Page 212, line 9—Page 215, line 4;

Page 294, line 8—Page 309, line 25;

(d) from the proceedings of June 14, 1949 (In Re Max Appelman):

Page 3, line 1—Page 16, line 20;

Page 19, line 14—Page 21, line 25;

Page 22, line 19—Page 23, line 4;

(e) from the proceedings of June 14 and 23, 1949:

Page 5, line 1—Page 11, line 23;



Page 15, line 19—Page 18, line 1;

Page 19, line 15—Page 20, line 6;

Page 21, line 20—Page 22, line 6;

Page 24, line 1—Page 100, line 9;

(f) from the proceedings of June 24, 28 and 29, 1949:

Page 141, line 1—Page 143, line 19;

Page 248, lines 10-17;

Page 255, lines 19-24;

Page 264, line 17—Page 265, line 7;

Page 266, lines 6-17;

Page 278, line 19—Page 279, line 1;

Page 294, line 25—Page 296, line 6;

Page 296, line 21—Page 297, line 24;

Page 302, line 6—Page 304, line 12;

2. The following exhibits:

Respondents' Exhibit A, June 9, 1949.

Respondents' Exhibit B, June 9, 1949, Idf.

Respondents' Exhibit C, June 9, 1949, Idf.

Respondents' Exhibit D, June 9, 1949, Idf.

Respondents' Exhibit E, June 9, 1949, Idf.

Respondents' Exhibit F, June 9, 1949, Idf.

Government's Exhibit 1, June 10, 1949.

Government's Exhibit 2, June 10, 1949.

Government's Exhibit 3, June 10, 1949.

Government's Exhibit 4, June 10, 1949.

Government's Exhibit 5, June 10, 1949.

Government's Exhibit 6, June 10, 1949.

Government's Exhibit 7, June 10, 1949.

Defendants' Exhibit A.

Defendants' Exhibit B.

3. All those portions of the record designated on appeal and constituting the printed Transcript of Record on Appeal in each of the following cases:

(a) United States v. Frank Edward Alexander, and others, Nos. 8786-PH through 8795-PH, numbered in the United States Court of Appeals for the Ninth Circuit as No. 12081.

(b) United States v. Samuel Harry Kasinowitz, and others, Nos. 20403, 20404 and 20405, and numbered in the United States Court of Appeals for the Ninth Circuit as No. 12217.

(c) United States v. Lillian Adele Doran, No. 8796-PH; Phillip Bock, No. 8827-PH; Irving Caress, No. 8839-PH; Robert Blair, No. 8842-PH; Merle Brodsky, No. 8874-PH; Frank Spector, No. 9321-PH, and numbered in the United States Court of Appeals for the Ninth Circuit as No. 12221.

4. The Presentments for each defendant.

5. Affidavit of Frank Slaby.

6. The Judgment and Sentence of the court for each defendant.

7. The Notice of Appeal for each defendant.

8. The Order of the Court of Appeals Staying Proceedings and Admitting Appellants to Bail.

9. This Designation.

Dated: July 13, 1949.

MARGOLIS and McTERNAN,

By /s/ JOHN T. McTERNAN,

Attorneys for Appellants.

Service of the within Designation of Record on Appeal and receipt of a copy thereof is hereby admitted this 14th day of July, 1949.

JAMES M. CARTER,

United States Attorney,

Attorney for Appellee.

By M. DeSCHAINÉ.

[Endorsed]: Filed Aug. 9, 1949.

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[Title of Court of Appeals and Causes.]

COUNTERDESIGNATION OF RECORD  
ON APPEAL

Comes now the appellee in the above-entitled matters and files this its Counterdesignation of Record on Appeal, and requests the Clerk to include in the Record on Appeal the following:

A

Reporter's Transcript of Proceedings of  
May 26, 1949

Page 15, lines 21 through page 16, line 25, inc.

Page 18, lines 1 through 14.

Page 19, lines 2 through 25.

Page 20, lines 1 through 25.

## B

Reporter's Transcript of Proceedings of  
June 9, 1949

Page 13, lines 5 through 25.

Page 14, line 1 through page 16, line 11, inc.

Page 44, line 11 through page 57, line 9, inc.

Page 75, line 16 through page 78, line 13, inc.

Page 98, line 6 through 24.

## C

Reporter's Transcript of Proceedings of  
June 10 and 11, 1949

Page 219, line 23 through page 220, line 4, inc.

Reporter's Transcript of Proceedings of  
June 14, and 23, 1949

Page 19, lines 1 through 14.

Page 20, line 7 through page 22, line 3, inc.

Page 25, line 1 through page 71, line 18, inc.

Page 96, line 4, through page 99, line 25, inc.

Page 106, line 24 through 25.

Page 107, line 1 through page 110, line 12, inc.

## D

Reporter's Transcript of Proceedings of  
June 24, 28 and 29, 1949

Page 279, line 5 through page 293, line 6, inc.

Page 299, line 14 through page 300, line 9, inc.

Page 301, line 14 through line 24.

## E

This Designation,

Dated: July 25, 1949.

JAMES M. CARTER,

United States Attorney.

ERNEST A. TOLIN,

Chief Asst. U. S. Attorney.

NORMAN W. NEUKOM,

Chief, Criminal Division,

Asst. U. S. Attorney.

ROBERT J. KELLEHER,

Asst. U. S. Attorney.

Attorneys for Appellee.

By /s/ ROBERT J. KELLEHER.

---

[Title of Court of Appeals and Causes.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

County of Los Angeles—ss.

Beulah Baxter Miller, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 600 Post Office and Court House, Los Angeles, California; that she is over the age of eighteen years and is not a party to the above-entitled action;

That on July 25, 1949, she deposited in the United States Mails in the Post Office at 312 No. Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Counterdesignation of Record on



Appeal addressed to Messrs. Margolis and McTernan, 112 West Ninth Street, Los Angeles, 15, California, their last known address, at which place there is a delivery service by United States Mails from said post office.

/s/ BEULAH BAXTER MILLER.

Subscribed and sworn to before me, this 25 day of July, 1949.

EDMUND L. SMITH,

Clerk U. S. District Court.

[Seal] By /s/ TOM A. McCART,

Deputy.

[Endorsed]: Filed July 27, 1949.

No. 12283

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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DOROTHY RAY HEALEY, MAX APPELMAN, ALVIN ABRAM  
AVERBUCK, ELVADOR G. GREENFIELD and HORACE MOR-  
TON NEWMAN, JR.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR APPELLANTS.

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MARGOLIS & McTERNAN,

112 West Ninth Street, Los Angeles 15,

*Attorneys for the Appellants.*

FILED  
MAY 23 1950

PAUL P. O'BRIEN,

CLERK



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The court below erred in ordering appellants to answer the questions put to them before the grand jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that under the Fifth Amendment to the Constitution of the United States appellants had the right to refuse to answer said questions on the grounds that answers to said questions might tend to incriminate them.....	21
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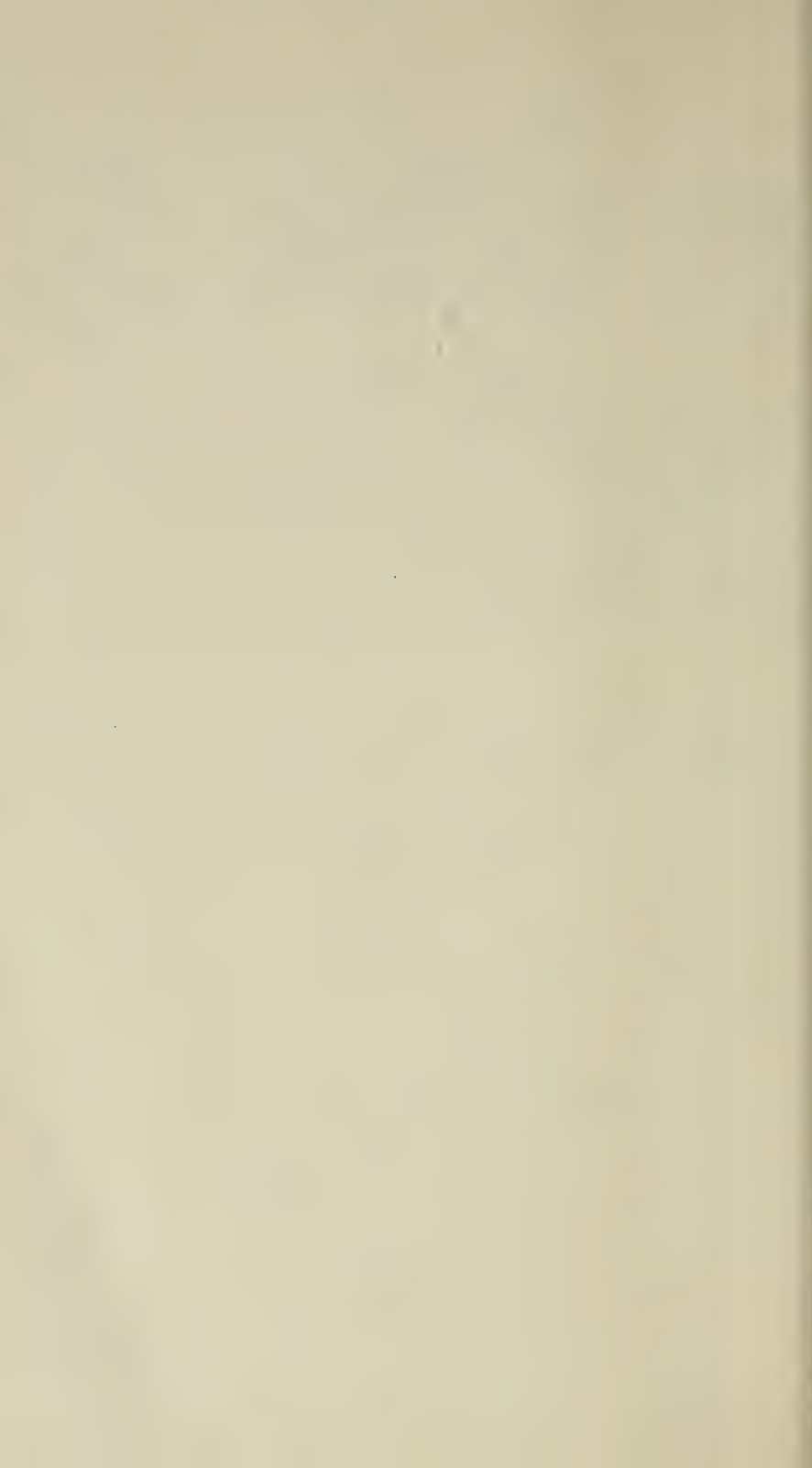
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No. 12283

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

DOROTHY RAY HEALEY, MAX APPELMAN, ALVIN ABRAM  
AVERBUCK, ELVADOR G. GREENFIELD and HORACE MOR-  
TON NEWMAN, JR.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR APPELLANTS.

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### Jurisdictional Statement.

These are appeals from judgments in criminal contempt of the United States District Court for the Southern District of California, Central Division. Jurisdiction of this Court is conferred by Title 28, United States Code, Section 1291, and Rule 37(a) of the Federal Rules of Criminal Procedure.

### Statement of the Case.

Appellants were convicted of criminal contempt for refusal to answer questions before the grand jury. They have been sentenced as follows: Healey to 1½ years in jail; Appelman, Greenfield and Newman to one year in jail each; and Averbuck to a fine of ten dollars.

The grand jury investigation in which these appellants were interrogated was the same as that wherein the appellants in *Alexander et al. v. United States* (9 Cir., No. 12081, decided February 4, 1950), *Kasinowitz et al. v. United States* (9 Cir., No. 12217, decided February 4, 1950, petition for rehearing denied April 21, 1950, and new opinion substituted), and *Doran et al. v. United States* (9 Cir., No. 12221, decided February 4, 1950)\* were involved. Appellants were summoned and interrogated for the same purpose as the appellants in the cited cases, and the general objectives of the grand jury's inquiry were the same as in those cases [R. 137, 135-136]. The questions asked of appellants in the case at bar are of the same tenor as those put in the above cases except that they are more detailed and call for a far more intimate knowledge of the internal structure, the procedures, practices and personnel of the Los Angeles County Communist Party. Appellants here, as did those in the prior cases, refused to answer the questions claiming their privilege against self-incrimination. The claim here, as there, is based upon a fear of prosecution under the Smith Act (18 U. S. C. 2385, 371) and is justified upon the same factual setting, somewhat amplified, as in those cases.

The questions for refusal to answer which appellants were found guilty of contempt are set out *seriatim* in the presentments [Appelman, R. 2-4; Averbuck, R. 6-9; Greenfield, R. 11-13; Healey, R. 15-20; Newman, R. 22-25], and all references to them in this brief will be in terms of the numbers assigned them by the grand jury. In the main the questions fall into definable groups as follows:

---

\*The opinions of the Court in these cases have not yet appeared in the official reports.

1. Questions asking for the identity of persons holding described offices in the Los Angeles County Communist Party. These questions were asked in one of two forms: "Do you know who—" (holds the designated office or position); or "Can you tell us the name of —" (the person holding the designated office or position).

Appelman, Nos. 2, 3, 4, 7, 11 [R. 3-4].

Averbuck, Nos. 3, 5, 6, 7, 8 [R. 8-9].

Greenfield, Nos. 1, 8, 10, 11 [R. 12-13].

Healey, Nos. 2, 10, 11, 17, 18, 19, 20, 21, 22, 36 [R. 17-20].

Newman, Nos. 6, 7, 8, 9 [R. 24].

2. Questions asking for the organizational structure and procedures of the Los Angeles County Communist Party. Typical of this group are, "Can you tell us who is the head of the southern division of the Los Angeles County Communist Party?" [Healey No. 19, R. 18] or "Can you tell us how many divisions there are in the Los Angeles or the Los Angeles County Communist Party?" [Healey, No. 13, R. 18] or "Can you tell us whether or not the membership or social director would have a list of the members of the Los Angeles County Communist Party?" [Healey No. 7, R. 17.]

Appelman, Nos. 5, 6, 8 [R. 4].

Greenfield, Nos. 5, 6, 7, 9 [R. 13].

Healey, Nos. 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 16, 23, 24, 25, 26, 27, 28, 29, 30 [R. 17-19].

Newman Nos. 10, 10a, 11, 12, 13 [R. 24].

3. Questions designed to develop Dorothy Healey's connection with the Los Angeles County Communist Party. These questions range from the identical



ones involved in the *Kasinowitz* case, *supra* (Do you know Dorothy Healey?—her business or occupation? [Newman Nos. 1, 2, 3, R. 24]) to such questions as “Did you ever see Mrs. Dorothy Healey with any of the books and records of the Los Angeles County Communist Party?” [Averbuck No. 9, R. 9].

Appelman, No. 1 [R. 3].

Averbuck, Nos. 2, 9 [R. 8, 9].

Greenfield, Nos. 2, 3 [R. 13].

Healey, Nos. 32, 33, 34, 35 [R. 19, 20].

Newman, Nos. 1, 2, 3, 15, 16 [R. 24, 25].

4. Miscellaneous questions in aid of one or another of the foregoing.

Appelman, Nos. 9, 10 [R. 4].

Averbuck, Nos. 1, 10 [R. 8, 9].

Healey, No. 12 [R. 18].

Newman, Nos. 4, 5, 14 [R. 24, 25].

Newman was first brought before the grand jury and interrogated on April 21, 1949 [R. 85, 90-91]. He was at that time excused subject to recall [R. 91]. On May 26, 1949, he was recalled and questioned further [R. 91-98]. It was on the latter date that Averbuck, Greenfield and Healey were first questioned by the grand jury [Averbuck, R. 78-84; Greenfield, R. 73-78; Healey, R. 60-73]. The questions above reviewed, along with others, were put to them and they refused to answer, claiming their privilege. As the result of proceedings on June 9 and 10, 1949, these four appellants (Newman, Averbuck, Greenfield and Healey) were ordered by the District Court to answer the questions set out in the respective presentments

and to be and appear before the Grand Jury on June 14, 1949, for this purpose.

Appellant Appelman was first examined before the grand jury on June 14, 1949 [R. 252-258]. Upon claiming his privilege he was that day ordered to answer after proceedings before the court below [R. 263-4].

All appellants were on June 14, 1949, examined before the grand jury on the questions which the court had commanded them to answer. As to each question they re-asserted their privilege against self-incrimination [Appelman, R. 283-285; Averbuck, R. 286, 289-290; Greenfield, R. 291, 294-296; Healey, R. 297, 303-310; Newman, R. 311-313-315]. Presentments in criminal contempt for their refusal to answer were filed that day [R. 266 ff; Appelman, R. 2; Averbuck, R. 6; Greenfield, R. 11; Healey, R. 15; Newman, R. 22], and appellants were thereupon arraigned, each pleading not guilty [R. 268 ff], and released on bail pending trial [R. 275].

The cases were tried on June 23 and 24, 1949 [R. 275 ff]. By order of the court below they were consolidated [R. 320]. On June 28, 1949, appellants were found guilty and sentenced as stated above [Appelman, R. 359; Averbuck, R. 359; Greenfield, R. 359; Healey, R. 373; Newman, R. 360].\*

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\*The judgments and commitments will be found in the record as follows: Appelman, R. 35; Averbuck, R. 37; Greenfield, R. 38; Healey, R. 40; Newman, R. 42.

The court below denied appellants bail pending appeal [R. 373-4], the reason given being that the appeals presented no substantial question.\* Similarly it denied a stay of execution pending application to this court for bail [R. 376, 378]. Appellants were enlarged upon bail pending appeal at the order of Chief Judge Denman [R. 53].

Because the cases of these appellants grew out of the same investigation as that giving rise to the *Alexander*, *Kasinowitz*, and *Doran* cases, *supra*, the court below ordered that the entire record in each of those cases be incorporated in and deemed part of the record in this case [on the motion for an order compelling Averbuck, Greenfield, Healey and Newman to answer, R. 117-118; on the motion to compel Appelman to answer, R. 261; on the trial of the presentments in criminal contempt, R. 316-318]. In their designation of record on appeal herein appellants included the printed records on appeal in those cases [R. 390].\*\*

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\*This was after the judgments in *Alexander et al. v. United States* (No. 12081) had been affirmed by virtue of the equal division of six judges of this court and before rehearing had been granted and that judgment reversed on February 4, 1950.

\*\*It will be recalled that those records were consolidated and printed in four volumes marked with roman numerals. References in this brief to those records will be preceded by the volume number, thus I R. ...., while references to the record of the proceedings below herein will be in the usual form, thus R. ....

## Summary of Appellants' Showing in Support of Their Claim of the Privilege Against Self-Incrimination.

For purposes of completeness and clarity there is set forth at this point a summary of the showing made in the *Alexander, Kasinowitz* and *Doran* cases, *supra*, all of which is part of the record here, together with the additional material received in the proceedings below against these appellants.

### 1. THE PURPOSE OF THE GRAND JURY INVESTIGATION (AS IT HAD BEEN FROM ITS START IN OCTOBER, 1948) WAS TO CONNECT APPELLANTS WITH THE COMMUNIST PARTY.

(a) The Purpose of the Grand Jury Investigation, as Disclosed by Government Counsel, Was to Ascertain the Whereabouts of the Membership Records of the Communist Party so That Their Production Could Be Compelled.

(1) James M. Carter, then United States Attorney in the Southern District of California, together with Max Goldscheine, Assistant to the Attorney General, in charge of the grand jury inquiry at which appellants were interrogated, stated to appellant Newman that the purpose of the investigation was to determine whether certain government employees had "told the truth or lied" when they denied membership in the Communist Party. For this purpose, Carter said, it was desired to obtain the membership records of the Communist Party [R. 89]. This, "generally speaking," has been the "purpose of the investigation" since it started in October of 1948 [R. 137].

- (2) As stated in the presentments in the case at bar, “It became necessary for said Grand Jury to inquire into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization” [R. 3, 7, 11-12, 16, 23].
- (3) Mr. Goldschein stated in the course of the proceedings below that he believed Dorothy Healey to be a “member of the Communist Party” and that he was trying to establish this so that the government could call upon her to produce those books and records [R. 159-160].
- (4) At one point in the proceedings below appellant Healey was directed as “an organizer of the Communist Party” to produce “all books and records of the Communist Party of Los Angeles County or the Los Angeles County Communist Party. . . .” [R. 70, 72]. She was also served with a subpoena *duces tecum* in somewhat more detailed form [R. 307]. She failed to produce any records, but the government’s motion for an order compelling production was taken off calendar by the court, *sua sponte*, and without objection from the government [R. 248]. Her compliance with the commands to produce records are therefore not involved in the judgment below or this appeal.



(b) **The Government Had Good Reason to Believe That Appellants Could Give the Information Government Counsel Stated That the Grand Jury Had Been Seeking Since the Start of the Investigation in October 1948.**

(1) A witness named Tony Adrean, produced by the government in the proceedings below of June 10, 1949, testified as follows concerning Dorothy Healey:

—As a former member of the Communist Party for six years he has met and known Dorothy Healey [R. 103].

—Dorothy Healey is organizational secretary and membership director of the Los Angeles County Communist Party [R. 103]. “She has a controlling or executive position in the Communist Party” [R. 104]. As such “she is in control of the day to day activities of the party, the membership, its officers, . . . an authoritative position . . .” [R. 105].

—Dorothy Healey’s office is located in an office building at 124 West Sixth Street on the fifth floor [R. 105].

—The name on the door of the suite of offices of which Dorothy Healey’s office is a part is “Communist Party of Los Angeles County” [R. 106].

—Dorothy Healey is the second in charge of the Los Angeles County Communist Party, directly under the chairman [R. 107].

—Under Dorothy Healey “come the various sections of the party . . . headed by organizers. Under the sections come the various clubs or the basic units of the party” [R. 108].

—The County offices of the party receive certain statistical information concerning each member of the party, including his “party name” [R. 109-111].

—The Dorothy Healey referred to in the witness’s testimony is the appellant Dorothy Healey in these proceedings [R. 106].

- (2) A clerk of an elections board of Los Angeles County and a neighbor of appellant Healey identified her as the person who signed a voter’s registration [Exhibit No. 1, 6/10/49, R. 217] and an elector’s roster [Exhibit No. 2, 6/10/49, R. 219] as “Mrs. Dorothy Ray Healey” [R. 202-207].

An assistant cashier of a Los Angeles bank identified bank signature cards containing authorized signatures for commercial bank accounts of the “Los Angeles County Committee, Communist Party,” address 124 West 6th Street, as well as resolutions of that organization authorizing those signatures. On each appeared the signature of Dorothy Ray Healey as one authorized to sign checks, and another signature, Dorothy Ray Healey as secretary of the aforesaid County Committee [R. 208-213; Exhibit No. 3, 6/10/49, R. 221-222; Exhibit No. 4, 6/10/49, R. 222; Exhibit No. 5, 6/10/49, R. 222-225; Exhibit No. 6, 6/10/49, R. 226-227; Exhibit No. 7, 6/10/49, R. 227-228].

A handwriting expert testified that the signatures of Dorothy Ray Healey on Exhibits Nos. 3-7, *supra*, were made by the same person who signed Mrs. Dorothy Ray Healey on Exhibits Nos. 1 and 2, *supra* [R. 214].

- (3) In the Fourth Report, Un-American Activities in California, 1948, a report of the Joint Fact-Finding

Committee of the California Senate to the regular California Legislature, 1948, are findings that "Dorothy Healey" is organizing secretary of the Los Angeles County "Section" of the Communist Party of the United States [R. 185].

- (4) The House Committee on Un-American Activities has made a similar finding [Exhibit A, p. 26, R. 322].
- (5) In the report of the California legislative committee, *supra*, appellants Averbuck, Newman and Greenfield are found to be officers or members of the Los Angeles Section of the Communist Party [R. 185, 187].
- (6) In the report of the Congressional committee, *supra*, appellants Averbuck and Newman are found to be officers of the Los Angeles Section of the Communist Party [Exhibit A, p. 26, R. 322].
- (7) In a number of articles in Los Angeles newspapers, offered but not received, appellants Averbuck, Greenfield and Healey were identified as officers or representatives of the Communist Party and described as witnesses summoned in the "lengthy investigation into party activities in the county" [Exhibit B, *Idf.*, R. 175; Exhibit C, *Idf.*, R. 178; Exhibit D, *Idf.*, R. 178; Exhibit E, *Idf.*, R. 179; Exhibit F, *Idf.*, R. 180]. The characterization of the grand jury investigation contained in Exhibits B and D (and as quoted herein) was never disclaimed or denied by government counsel.
- (8) After all of the evidence above summarized was in the record the court below, particularly with reference to Exhibit A [R. 322], stated:

"I suppose I should say, while you are on this subject, in view of your statement, that it would

also indicate to me as a judge that these witnesses called before the grand jury by virtue of this public information are persons who could be likely to give the information desired by the grand jury concerning the membership records of the Los Angeles County Committee of the Communist Party, or the Los Angeles County Communist Party, or however it happens to be designated" [R. 325].

(9) Mr. Carter testified that he had made the public statement that he had summoned appellants and the witnesses who had preceded them (*i. e.*, Alexander, *et al.*; Kasinowitz, *et al.*; Doran, *et al.*) because he thought he "could obtain from them the whereabouts of the Los Angeles County Communist Party membership records" [II R. 280-281].

2. APPELLANTS HAD GOOD REASON TO FEAR THAT THIS GRAND JURY INQUIRY WAS PART OF THE NATIONWIDE DRIVE CONDUCTED BY THE DEPARTMENT OF JUSTICE AGAINST THE COMMUNIST PARTY, ITS LEADERS AND MEMBERS, UNDER THE SMITH ACT.

(a) But appellants' showing concerning the nature of the grand jury investigation went beyond the purported inquiry into violation by government employees of the false statement statute. Appellants tried to show a number of statements attributed by the Los Angeles press to Mr. Carter and his associate, Mr. Max Goldschein, a special assistant to the Attorney General, sent out to Los Angeles from Washington, D. C., for this inquiry. These press statements tie in significantly with Mr. Carter's singular reservation in describing the purpose of the inquiry into false statements by government employees. After stating that

the inquiry related to such false statements and the purpose of obtaining the Communist Party membership list, he added that it “did not, of course, refer to anything about the *purpose of the grand jury*. I stated that that was *my purpose* . . .” (emphasis added) [II R. 287]. The press statements are also particularly relevant to other facts appellants sought to adduce concerning the Attorney General’s findings concerning the legality of the Communist Party under the Smith Act and a proposed nationwide crack-down on the Communist Party, its officers and members and affiliates, which will be analyzed, *post*, in Section 3 of this summary.

The proffered press statements of Messrs. Carter and Goldschein are as follows:

- (1) On October 27, 1948, two days following the day and night proceedings of October 25, 1948 (which gave rise to the *Alexander* case, *supra*), the Los Angeles Examiner carried a front page story under the head, “Officials Plan ‘All-Out’ Red Inquiry Here,” which read in part as follows:

“Ten witnesses are jailed for refusing to answer in probe.

“Communist groups and activities in Southern California are scheduled to undergo a ‘top-to-bottom’ investigation by a special Federal grand jury here . . .

“This was indicated by high government officials yesterday after ten witnesses were committed to jail for refusing to answer grand jury questions.

“‘This is only the opening gun in the government’s inquiry into subversive and



disloyal groups,' United States Attorney James M. Carter declared" [II R. 302].

- (2) On the same day, the Los Angeles Times also gave first page prominence to an interview with Carter and Goldschein. This article read in part:

"Scope of the current inquiry into Communist activities is limited to those of government employees at the present time, U. S. Attorney James M. Carter and Max Goldschein, a Special Assistant to the U. S. Attorney General said.

"Both Carter and Goldschein said that in the event the inquiry turns up evidence of Communistic activities other than among Federal employees they will investigate any such cases and prosecute if sufficient evidence is uncovered" [II R. 304].

- (b) An official release of the Department of Justice has described the contempt actions growing out of this very grand jury investigation (that is, *Alexander, et al., v. U. S.*, No. 12081; *Kasinowitz, et al., v. U. S.*, No. 12217; *Doran, et al., v. U. S.*, No. 12221) as "prosecution action in the courts against communists in the United States." This prosecution is stated to be but a part of the government's drive against members of the Communist Party, headed by the prosecution under the Smith Act, of the "members of the Communist National Board" [Exhibit B, R. 344, 345]. The Attorney General in office from the time this grand jury investigation began until after the close of the proceedings below made virtually identical statements in an article written by him in *Look Magazine*, August 30, 1949.

3. APPELLANTS SHOWED THAT THE DEPARTMENT OF JUSTICE HAD INSTITUTED PROSECUTIONS UNDER THE SMITH ACT AGAINST THE LEADERS OF THE COMMUNIST PARTY BASED UPON THEIR FORMATION OF THE PARTY AND THEIR MEMBERSHIP THEREIN; AND APPELLANTS PROFFERED A SHOWING THAT IT HAD BEEN REPORTED THAT NATIONWIDE PROSECUTION OF THE COMMUNIST PARTY, BEGUN THROUGH GRAND JURY INVESTIGATIONS, WERE IMMINENT IN LOS ANGELES AND ELSEWHERE. ON THE BASIS OF THIS SHOWING APPELLANTS' ANSWERS MIGHT HAVE PLACED THEM IN GRAVE IMMEDIATE PERIL.

(a) The indictment returned in the Southern District of New York against 12 persons, being the same as those identified as the "National Secretariat" of the Communist Party with which appellants were connected by the Congressional and California Legislative Committees (see *ante*, section 1(b)(3)-(6) of this summary). This indictment charges that the leaders of the Communist Party

" . . . did conspire . . . to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence . . . ." (This document was received in evidence in the *Alexander* case as Exhibit A [IV R. 51]. It is set out in full at II R. 327. It was rejected as immaterial in the *Kasinowitz* and *Doran* cases [II R. 295, 296]. Since the records of all three cases are incorporated in the record at bar, the document may properly be considered as in evidence here.)

- (b) The indictments brought in the Southern District of New York against the same 12 persons individually charging each of them with membership in the Communist Party, knowing its purposes to be as alleged in the conspiracy indictment. (This document was received in evidence in the *Alexander* case as Exhibit B [IV R. 54]. It is set out in full at II R. 331. It was rejected as immaterial in the *Kasinowitz* and *Doran* cases [II R. 296]. Since the records of all three cases are incorporated in the record at bar, the document may properly be considered as in evidence here.)
- (c) Extract from the docket of the United States District Court for the Southern District of New York showing that in the cases referred to above the motion to dismiss was overruled [II R. 297, 332]. At the time of the proceedings below these cases were being tried, and the trial court, by overruling various motions made at the conclusion of the government's case, indicated that it was satisfied that the prosecution had proven a *prima facie* case (New York Times, May 21, 1949). Since then, of course, the defendants in those cases were convicted and sentenced to long prison terms (New York Times, October 15, 1949, p. 1).
- (d) An article in the Los Angeles Examiner for July 21, 1948, on the arrest of the leaders of the Communist Party in connection with the New York indictments just referred to. The article refers to the New York proceedings as "the greatest crackdown on Com-

munists in the nation's history." Near the end of the article appears this significant passage:

"Local Federal attorneys indicated that the indictment and arrest of Foster may be the forerunner of a possible nationwide roundup of all American Communist Party members, or persons known to be associated in Communist activities." [Ex. D. Idf., II R. 335-336; offered and rejected as immaterial, II R. 297-298.]

- (c) An article in the Los Angeles Examiner for September 17, 1948, entitled, "Washington Scene" and apparently as syndicated columnist's story on the plans of the Department of Justice. The portions pertinent here follow:

"The Democrats, through Attorney General Tom Clark, plan a sensational attempt to take the anti-Communist play away from the Republicans in the next few weeks.

"The Department of Justice will seek indictments against well known Communists in key cities all over the country . . .

"The Department of Justice will make a big production out of it. The Attorney General will let it be known his investigators have been on their toes all along, but were only waiting for the time to be ripe before making their spring.

"The move, it is hoped, will have great political effect. It is designed to overplay and overshadow any cracks Dewey might make on Administration laxity in prosecuting enemies of the country . . . ." [Ex. E, Idf., II R. 337; offered and rejected as immaterial, II R. 299-300.]

- (f) An article from the New York Times, of September 29, 1948, setting forth the text of a speech by President Truman, portions of which are:

“My Administration has been steadily and successfully fighting Communism. We have acted instead of just talking about it . . .

“The FBI, the greatest counter-espionage organization in the world, headed by J. Edgar Hoover, is alert, vigorous and skillful. It is watching the Communists closely and systematically protecting our internal security . . .

“On the basis of evidence collected by the FBI and submitted to the grand jury, twelve top Communist leaders will go to trial in New York on October 15th. We have prosecuted and we shall prosecute subversive activities wherever we find them. But we must have real evidence. We cannot use speeches of Republican politicians as evidence.” [II R. 308.]

That the threat of a nationwide drive against members of the Communist Party involved Los Angeles specifically and therefore presented a direct and immediate threat to people in that community, appears from the showing proffered by appellants in the next succeeding paragraphs.

- (g) An article from the New York Times, dated September 18, 1948, setting forth a letter to Attorney General Tom Clark from Senator Ferguson, chairman of a United States Senate investigating committee, “making urgent request that the Department of



Justice take action seeking indictments against known Communists . . .” The Senator added that evidence in the possession of his committee and the Department of Justice “constitute in my opinion—and I am speaking as a lawyer of some experience—a more than adequate basis for such indictments.” [Ex. I, Idf., II R. 305-306.]

(h) The same article included this paragraph:

“As this demand came by letter, it was reported from an apparently responsible source that the Justice Department already had decided to assemble grand juries in Washington, Denver, Salt Lake City, Dallas, Los Angeles and San Francisco for intensive inquiry into Communist activities. These were the cities which Senator Ferguson suggested as possible spawning grounds for indictment against Communistic activities which may have threatened national security.” [Ex. I, Idf., II R. 305-306.]

(i) In this connection, there is to be considered the public statements attributed to Messrs. Carter and Goldschein, on October 27, 1948, after the grand jury investigation in Los Angeles had begun with the parting of the witnesses in the *Alexander* case. These statements were to the effect that the grand jury was engaged in a “top-to-bottom investigation” of “Communist activities,” which was only an “opening gun in the government’s inquiry into subversive and disloyal

groups” and that evidence of Communistic activities, if sufficient, would lead to prosecution. [See section 2 of this summary and II R. 302, 304.]

- (j) Stipulation that the California Legislative Committee on Un-American Activities, referred to above, had found that the Communist Party advocated the overthrow of government by force and violence [II R. 294; rejected as immaterial, II R. 295]. The Congressional committee has reached similar findings. [See Ex. A, R. 322, Questions and Answers numbered 3, 47, 50, 51, 69, 70.] Each committee made these findings with respect to the Communist Party with which it had connected appellants Healey, Averbuck, Greenfield and Newman in this case. (See this summary, section 2(b)(3)-(6), *ante*.)

4. THE BASIS OF THE CLAIM OF PRIVILEGE AGAINST SELF-INCRIMINATION ASSERTED BY THESE APPELLANTS IS THE SAME IN FACT AND IN LAW AS THAT ASSERTED BY THE WITNESSES IN THE ALEXANDER CASE (No. 12081), THE KASINOWITZ CASE (No. 12217) AND THE DORAN CASE (No. 12221), SUPRA [R. 117-118, 261, on the motion to compel these appellants to answer; R. 316-318 on the trial of the criminal contempt case].

## ARGUMENT.

### I.

**The Court Below Erred in Ordering Appellants to Answer the Questions Put to Them Before the Grand Jury and in Adjudging and Committing Appellants, and in Sentencing Appellants for Contempt for Their Refusal to Answer Said Questions in That Under the Fifth Amendment to the Constitution of the United States Appellants Had the Right to Refuse to Answer Said Questions on the Grounds That Answers to Said Questions Might Tend to Incriminate Them.** [Statement of Points upon which Appellants Intend to Rely on Appeal, Point 1, R. 50, 380.]

Because, as will be developed below, the issues presented in this appeal are identical with those disposed of by this court in the *Alexander*, *Kasinowitz* and *Doran* cases, *supra*, and to save repetition, we here incorporate by this reference Appellants' Brief in the *Alexander* case and Appellants' Brief and Reply Brief in the *Kasinowitz* and *Doran* cases. The argument below will be confined to analysis showing that the claim of privilege here rests upon substantially the same facts and the same legal principles as those urged to the court and adopted by it in those cases.

**Questions of the Nature Here Involved, Propounded in the Course of an Inquiry Having the Purposes Indicated in Appellants' Showing Call for Answers Which Could Connect Appellants With the Communist Party.**

- (1) *Questions asking for the identity of persons holding described offices in the Los Angeles County Communist Party* (Appelman, Nos. 2, 3, 4, 7, 11 [R. 3-4]; Averbuck, Nos. 3, 5, 6, 7, 8 [R. 8-9]; Greenfield, Nos. 1, 8, 10, 11 [R. 12-13]; Healey, Nos. 2, 10, 11, 17, 18, 19, 20, 21, 22, 36 [R. 17-20]; Newman, Nos. 6, 7, 8, 9 [R. 24]).

These questions are no different for present purposes from the question "Do you know the names of the county officers of the Los Angeles County Communist Party?" put to the witnesses in the *Alexander* case (No. 12081), *supra*, and to certain of the witnesses in the *Doran* case (No. 12221)\* *supra*. The questions put to appellants here seek the same information in more detailed form. In lieu of asking one overall question seeking the names of all the officers of the Los Angeles County Communist Party the prosecutors in this case broke the questions down. Appelman was successively asked, do you know who the chairman is (No. 2), who the membership director is (No. 3), who the financial director is (No. 4), the section organizers (No. 7), who was in charge (No. 11). Averbuck was asked successive questions concerning chairman, "membership or social organizers," "financial organizers or financial directors" of the divisions of the Communist Party (Nos. 5, 6 and 7), concerning any divisional official who has membership records of that

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\*See questions numbered 1 and 13 in Appendix A-2 of Appellants' Brief in that case.

division (No. 8) and who has the books and records of the county organization (No. 3). Greenfield and Newman were asked similar questions. Healey was asked questions of the same nature but with greater specificity as to the particular divisions concerning which the information was desired.

It was urged to this court in the *Alexander* and *Doran* cases, *supra*, that an answer to the general question, "Do you know the names of the county officers of the Los Angeles County Communist Party?" might be incriminating. This, because an admission of *knowledge* of these things might, in the context there shown, constitute either some proof in the probative chain establishing membership or affiliation or some other form of association with the Communist Party actionable under the Smith Act. *A fortiori* does this apply to a line of questions calculated to develop similar information but in a more specific and detailed form and concerning subordinate officers *knowledge* of whom is more likely to be obtainable only through some form of participation in the affairs of the organization itself. We incorporate at this point pages 18-22 of Appellants' Brief in the *Alexander* case and pages 45-49 of Appellants' Brief in the *Kasinowitz* and *Doran* cases.

The decisions of this court in the *Alexander*, *Kasinowitz* and *Doran* cases are determinative of this aspect of the case.

(2) *Questions asking for the organizational structure and procedures of the Los Angeles County Communist Party* (Appelman, Nos. 5, 6, 8 [R. 4]; Greenfield, Nos. 5, 6, 7, 9 [R. 13]; Healey, Nos. 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 23, 24, 25, 26, 27, 28, 29, 30 [R. 17-19]; Newman, Nos. 10, 10a, 11, 12, 13 [R. 24]).



These questions taken together are essentially the same as the questions "Do you know the table of organization and duties of the Los Angeles County Communist Party?" put to the witnesses in the *Alexander* case, *supra*, and the question "Do you know the organizational set up of the Los Angeles County Communist Party?" put to the witnesses in the *Doran* case, *supra*. In this connection, as with the group of questions just discussed, the prosecutor, rather than asking one or two broad questions covering the entire field, as was done in the prior cases, asked a series of separate questions the total effect of which would have been to elicit the same information. Thus the questions in this group directed to Appelman inquired concerning the sectional subdivisions of the Los Angeles County Communist Party and the title of their officers; Greenfield's questions dealt similarly with the divisional echelons of the same organization. The questions put to Healey related to the organizational chart of the county organization of the Los Angeles County Communist Party (Nos. 3-9, 30), with the divisional organization of the Los Angeles County Communist Party (Nos. 13, 14, 23-29), and with the numbers of sections, clubs and squads (Nos. 15 and 16). All of the questions put to Newman in this category dealt with the table of organization on the county level only.

Here as with the first group of questions discussed above the interrogation sought knowledge on the part of appellants of the internal workings of the Los Angeles County Communist Party which could have come from close association with the organization and familiarity with its affairs. It was urged in the *Alexander*, *Kasinowitz* and *Doran* cases that to admit having knowledge of the "table or organization and duties" of this organization

(or of its "organizational set up") would be incriminating in the setting established, because such answers could be used with other facts to prove association with the Communist Party culpable under the Smith Act. Far more so would answers to the questions in the case at bar which seek out knowledge of the organizational set up of virtually the entire organization from the top county officers down through divisions and sections, clubs and squads.\* We here incorporate the same portions of Appellants' Briefs in the *Alexander* and the *Kasinowitz* and *Doran* cases referred to in the preceding discussion. On this group of questions the decisions of this court in those cases are controlling.

- (3) *Questions designed to develop Dorothy Healey's connection with the Los Angeles County Communist Party* (Appelman, No. 1 [R. 3]; Averbuck, Nos. 2, 9 [R. 8, 9]; Greenfield, Nos. 2, 3 [R. 13]; Healey, Nos. 32, 33, 34, 35 [R. 19, 20]; Newman, Nos. 1, 2, 3, 15, 16 [R. 24, 25]).

It is to be recalled that one of the purposes of the grand jury's inquiry was to establish from these appellants that Dorothy Healey was organizing secretary of the Los Angeles County Communist Party and had custody or control of its membership records so that production of those records could be accomplished. (See Sec. 1(a) of the Summary of Appellants' Showing, *ante.*) Moreover,

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\*The government's witness Adrean testified to the organizational set up of the Los Angeles County Communist Party, describing and naming certain of the top county officers, explaining the sectional and club subdivisions [R. 107-109]. He spoke from personal knowledge based on former membership [R. 103, 111]. The questions put to appellants, therefore, called for knowledge of that which the government could prove actually existed and answers could therefore be patent evidence of appellants' association with the Communist Party.

the government produced considerable evidence to the effect that Dorothy Healey held that position and had such custody. (See Sec. 1(b) of the Summary of Appellants' Showing, *ante*.) Certain of the questions put to appellants are identical with those involved in the *Kasinowitz* case, *supra*. They ask "Do you know Dorothy Healey?" [Averbuck, No. 2, R. 8; Newman, No. 1, R. 24], or "Do you know her office address?" or ". . . her business or occupation?" [Newman, Nos. 2, 3, R. 24]. We here incorporate pages 27-38 of Appellants' Brief in the *Kasinowitz* case. The decision of this court in the *Kasinowitz* case supports the claim of privilege here.

The other questions in this group on their face call upon appellants to testify in some detail concerning Dorothy Healey's official connection with the Los Angeles County Communist Party. Thus, Averbuck was asked whether he had "ever seen Mrs. Dorothy Healey with any of the books and records of the Los Angeles County Communist Party" [No. 9, R. 9]. Greenfield was asked, "Does she have the books and records of the Los Angeles County Party, do you know" [No. 3, R. 13]. Newman was asked whether he knew Dorothy Healey to be the organizational secretary of the Communist Party of Los Angeles County and whether she has "in her possession or under her control" any of the records of that organization [Nos. 15 and 16, R. 25]. *Knowledge* on such subjects could come from participation in the affairs of the Los Angeles County Communist Party, and in light of the showing here made, any knowledge on appellants' part

probably does have such a basis. It is therefore plain that answers to these questions could have furnished evidence to be used to connect appellants by membership or affiliation with the Communist Party. The decisions of this court in the *Kasinowitz* and *Doran* cases, *supra*, completely dispose of these issues.

Healey was asked a series of questions which either on their face, or in light of the facts produced by the government itself through the witness Adrean (see Summary of Appellants' Showing, Section 1(b)(1), *ante*), called for her to identify herself as the organizational secretary of the Los Angeles County Communist Party or otherwise in charge of its records.

There remains one question, put to Greenfield in this form, "Was that the first time you ever saw her?" [No. 2, R. 13]. Examination of the grand jury transcript shows that the question referred to Dorothy Healey. Greenfield was asked, "Do you know Dorothy Healey?" [R. 73]. He answered that he knew she was "connected with this case"—"I know she is out here in the anteroom" [R. 75]. It was then that he was asked, "Was that the first time you ever saw her?" [R. 75]. Patently the prosecutor was trying to establish some other association between Greenfield and Healey. A negative answer to this question might well have led to a question as to whether, like the witness Adrean, for example, Greenfield had met or seen Healey at a meeting of the Communist Party or at the Communist Party office at 124 West 6th Street. The answer to the question, therefore, could have produced at least an evidentiary lead to facts connecting Greenfield with the Communist Party. The claim of privilege is therefore good.



(4) *Miscellaneous Questions in Aid of One or Another in the foregoing groups* (Appelman, Nos. 9, 10 [R. 4]; Averbuck, Nos. 1, 10 [R. 8, 9]; Healey No. 1 [R. 17]; Newman, Nos. 4, 5, 14 [R. 18]).

At the outset it should be noted that all questions directed to each of the appellants were part of the inquiry seeking the whereabouts of the Communist Party membership records and thus proximately connecting appellants with that organization. Taken out of this context the questions in this group would have no materiality. Since they are part of such a line of questions, appellants' privilege is available to them on the basis of the showing made delineating the risk of prosecution which the interrogation as a whole has created for them (see *United States v. Rosen*, 2 Cir., 174 F. 2d 187, 192).

Appelman was asked where he had used the name Matt Pelman before [No. 9, R. 4]. Each of these appellants was summoned because the prosecution thought he knew the whereabouts of the membership records of the Communist Party, and the court below was impressed that appellants "would be likely to give the information desired" (see Summary, *ante*, Sec. 1(b)). It is therefore quite probable that Appelman is or was a member or affiliate of the party. The witness Adrean testified that members went by "party names" for "security reasons" [R. 109]. It is reasonable to suppose, then, that Matt Pelman may have been Max Appelman's party name. The question may well have called for just such a disclosure and its incriminating nature is therefore quite apparent.



Appelman was also asked whether he had ever been to the Los Angeles offices of the Los Angeles County Committee of the Communist Party [No. 10, R. 4]. The incriminating possibilities of an affirmative answer to this question need no elaboration (*United States v. Cusson*, 2 Cir., 132 F. 2d 413).

Averbuck was asked what name was on the door on an office he worked out of at 124 West 6th Street in Los Angeles [No. 1, R. 8]. He testified that the office was on the fifth floor at that address\* [R. 78]. The government's witness Adrean testified that the offices of the Los Angeles County Communist Party are located at 124 West 6th Street in Los Angeles, on the fifth floor, and that the name on the door is "Communist Party of Los Angeles County" [R. 105, 106]. Averbuck's answer may well have named this office as the one he worked out of. Plainly, Averbuck set the door sufficiently "ajar" (*United States v. Weisman*, 111 F. 2d 260, 262) to show that his answer might connect him with the Communist Party and thereby endanger him under the government's application of the Smith Act.

Averbuck was also asked for whom he was an organizer [No. 10, R. 9]. Healey was asked the same question [No. 1, R. 17]. In view of what has just been said and the entire setting of this question, every reason ap-

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\*The printed record contains a typographical error rendering the address as "124 West 68th Street." It should read, as in the original transcript, "124 West 6th Street."

pears to follow the earlier decision of this court on this question in the *Alexander*, *Kasinowitz* and *Doran* cases, *supra*.

Newman was asked for his business address, "who" he was educational director for and whether he reports "to anybody who you see?" [Nos. 4, 5, 14, R. 24, 25]. Given the "public information" [R. 325] to the effect that Newman is an officer of the Communist Party in Los Angeles and his selection by the prosecutor as one who is likely to know the whereabouts of the Communist Party membership records, it is reasonable that Newman's answers to these questions would place his business address at 124 West 6th Street, Los Angeles, on the fifth floor, describe his position as educational director for the Los Angeles County Communist Party and his superior as Dorothy Healey, who according to Adrean is second in command there [R. 107]. The likely danger from answers to these questions is therefore rather obvious.

There remains but one general observation to be made concerning appellants' fear of incrimination under the Smith Act from answers connecting them with the Communist Party or providing leads to evidence making such a connection. Appellants have shown a rational basis for fear of being involved in a nationwide prosecution of Communists under the Smith Act. (See Summary, *ante*, Secs. 2 and 3.) Their fears were not merely reasonable under the circumstances, they were a completely accurate portrayal of the government's plans. That this is so was confirmed by events occurring after the trial below. On January 12, 1950, one Raymond P. Whearty, an acting Assistant Attorney General, Criminal Division, testified before a sub-committee of the House Appropriations Committee concerning the 1951 appropriations for the Department of Justice. He testified that the Criminal Division now has ready for prosecution some 12,000 cases against "members of the Communist Party who can be shown to be sympathetic and appreciative of its views." Excerpts from his testimony follow:

"*Mr. Whearty:* The bulk of the cases involve subversive activity as applied to individuals or organizations. By that I mean persons who are active members of the Communist Party and similar organizations, or who appear to be acting in concert with Russian interests. Does that answer your question sufficiently?"

\* \* \* \* \*

"I should also say that with respect to many of these persons engaged in subversive activities, such

as the Communist case in New York, in line with our appearance before the committee last year, there is a program of extensive suits to prosecute members of the Communist Party who can be shown to be sympathetic and appreciative of its view. We prosecute them as individuals under the Smith Act.

“I will call your attention to the fact that in New York the defendants in the Communist trials have been directed to file their briefs before the circuit court of appeals by May 1, which happens to be May Day, although I do not suppose the court considered that angle of it, but if they fail to appeal then their plea is going to be dismissed. The meaning of that is that the appeal is going to be argued in this term of court. I feel that if the case is decided in the lower court, it will be in the Supreme Court of the United States next fall. I cannot conceive of the Supreme Court not taking this case, and we will have an ultimate decision one way or the other. If the Government is sustained in the Supreme Court of the United States, it will be about the fiscal year 1951 when that program will come up. That is the work load which we must look forward to as possible, and indeed very probable.

“*Mr. Rooney:* Of the 21,105 cases now pending, how many of them would you say depend upon the outcome of the Communist trial in New York?

“*Mr. Whearty:* Roughly, 12,000.”

(Testimony of Mr. Raymond P. Whearty, Acting Assistant Attorney-General, Criminal Division, on Thursday, January 12, 1950, before the Subcommittee on Appropriations, House of Representatives, on Department of Justice Appropriations for 1951, 81st Cong., 2d Sess., p. 86.)

It is therefore established that nationwide prosecutions under the Smith Act against Communists are definitely projected by the government and that this drive only awaits final affirmance of the convictions of the National Board of the Communist Party. Appellants' peril from the grand jury investigation here involved is plain and immediate.

### Conclusion.

The judgments below should be reversed and the criminal contempt proceedings against appellants dismissed.

Respectfully submitted,

MARGOLIS & McTERNAN,

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No. 12283

*Docketed*

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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DOROTHY RAY HEALEY, MAX APPELMAN, ALVIN ABRAM  
AVERBUCK, ELVADOR G. GREENFIELD and HORACE  
MORTON NEWMAN, JR.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR APPELLEE.

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**FILED**

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MORTON NEWMAN, JR.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR APPELLEE.

---

### Jurisdictional Statement.

These are appeals from judgments for contempt of court, criminal, in the United States District Court for the Southern District of California, Central Division. This Court obtains jurisdiction of the appeal by virtue of Title 28, U. S. C., Sections 1291 and 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

### Statement of the Case.

Appellants Healey, Appelman, Averbuck, Greenfield and Newman were convicted of criminal contempt because they refused to obey the order of the Court and answer certain questions before the Federal Grand Jury. Except



in the case of appellant Healey, the issues of law here on appeal are similar to those in the case of *Kasinowitz, Steinberg and Dobbs*, No. 12217, in which Opinions were handed down, bearing the dates of February 4, 1950, and April 21, 1950. In that case the District Court was reversed, Chief Judge Denman having written the April 21st Opinion, Judge Pope concurring in the result only, and Judges Mathews, Healy and Bone dissenting.

A petition for certiorari in that case has been filed with the United States Supreme Court to review that judgment in the October Term, 1950.<sup>1</sup>

In the present case the matter of the criminal contempt of Dorothy Ray Healey stands apart from that of the other appellants. The Grand Jury presentment was as follows:

“In the Matter of:

Witness Dorothy Ray Healey

Criminal Contempt

Section 401, Title 18, U. S. Code.

The Grand Jury of the United States of America for the Southern District of California, Central Division, September Term, 1948, upon their oath present:

1. That on or about the 25th day of October, 1948, the Grand Jury for the United States of America duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September,

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<sup>1</sup>Certiorari has been granted on May 15, 1950, No. 22, Oct. Term, 1950, in the similar case of *Patricia Blau v. United States*, 180 F. 2d 103, from the 10th Cir. which affirmed the judgment of the District Court.

1948, Term, undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U. S. Code, Revised Title 18 U. S. Code, Section 1001, and other criminal laws of the United States. In pursuance of such inquiry, it became necessary for said Grand Jury to inquire into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization.

Further the Grand Jury presents:

2. That Dorothy Ray Healey was subpoenaed and appeared as a witness before said Grand Jury and on May 26, 1949, then and there refused to answer certain questions propounded to her, she claiming that the answers thereto may tend to incriminate her.

3. Thereafter she appeared before the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on the 9th day of June, 1949, in open court where the claim of privilege of the witness Dorothy Ray Healey was challenged by the Government. The Court then heard the questions propounded to the witness, and the answers she made to said questions. Thereafter, the said witness was offered an opportunity to be heard by the Court, privately in chambers as to how her privilege against self-incrimination would be violated by answering said questions, but the witness did not avail herself of the opportunity.

4. The Court found that there was no present danger of such tendency to incriminate the said wit-

ness Dorothy Ray Healey, and on June 11, 1949, ordered her to return before the Grand Jury on June 14, 1949, and answer the said questions (upon which she claimed her aforesaid privilege), namely:

(1) Will you tell us who you are organizer for?

(2) Now, Mrs. Healey, do you know who has the books and records of the Los Angeles County Communist Party?

(3) Can you tell us, Mrs. Healey, whether or not the Los Angeles County Communist Party has a chairman?

(4) Can you tell us whether or not it has an organizational secretary?

(5) Can you tell us whether or not it has an educational director?

(6) Can you tell us whether or not it has a labor director?

(7) Can you tell us whether or not the membership or social director would have a list of the members of the Los Angeles County Communist Party?

(8) Can you tell us whether or not they have a financial director?

(9) Can you tell us whether or not the financial director would have a record of the dues paid by the members of the Los Angeles County Communist Party?

(10) Can you tell us who has the record showing the dues paid by the membership of the Los Angeles County Communist Party?

(11) Now, Mrs. Healey, can you tell us the name of anyone who can give us that information I just asked you?

(12) But that information is available, is it not?

(13) Can you tell us how many divisions there are in the Los Angeles or the Los Angeles County Communist Party?

(14) Can you tell us how many sections there are in the divisions?

(15) Can you tell us how many clubs there are?

(16) Can you tell us how many squads there are?

(17) Mrs. Healey, can you tell us who is chairman of the eastern division of the Los Angeles County Communist Party?

(18) Can you tell us who is the chairman of the midtown division of the Los Angeles County Communist Party?

(19) Can you tell us who is the head of the southern division of the Los Angeles County Communist Party?

(20) Can you tell us who is the head of the western division of the Los Angeles County Communist Party?

(21) Can you tell us who is the head of the youth division of the Los Angeles County Communist Party?

(22) Can you tell us who is the head of the student section of that youth division?

(23) Mrs. Healey, each division has a chairman, does it not?

(24) Or sometimes called an organizer?

(25) Does each division have an organizational secretary?

(26) Does each have a membership or social secretary?

(27) Does each have a membership or social director?



(28) Does the membership or social director of each division have a list of the membership of that division?

(29) Does each division have a financial director?

(30) Do not the membership director and the financial director have the books and records of the Los Angeles County Communist Party?

(31) Same as question No. 2.

(32) Now, that statement with reference to Mrs. Dorothy Ray Healey, the organizational secretary of the Los Angeles Communist Party, is that designation correct with reference to you?

(33) What is your business address?

(34) You are in charge of those records, are you not?

No.

Who is?

(35) Are these records in the place of business where you work?

(36) Do you know who does have control over the records?

5. Further the Grand Jury presents that on the 14th day of June, 1949, the said Dorothy Ray Healey was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection with the matters heretofore described, and again each of the said questions hereinabove listed which the Court ordered her to answer, were asked of the said witness, who then persistently refused to answer said questions, stating categorically that she refused to answer each of the questions on the ground that it would incriminate her.



6. That the said Grand Jurors, upon their oaths, present: That the said Dorothy Ray Healey, a witness before this Grand Jury, has given an obstructive, evasive and contumacious answer to each of the said questions propounded to her before said Grand Jury; that each of said questions was proper and material to the Grand Jury's inquiry and that no one or all of said questions would tend to incriminate the said witness of a violation of a federal offense; that the answer to each of said questions operated to shut off and block the instant inquiry, and block the search for truth; and the said witness has wilfully, deliberately and contumaciously obstructed the investigation of said Grand Jury in the matter hereinabove set forth by failing and refusing to answer each of the aforesaid proper and material questions put to her in the proceeding before the Grand Jury, which the Court ordered her to answer.

The Grand Jury therefore respectfully prays the Court to invoke its punitive power against said witness to maintain the proper functioning of the court and the Grand Jury and that it exercise such powers so that the court's act may serve as a deterrent on other recalcitrant witnesses.

/s/ R. B. Ahlswede,  
Foreman.

/s/ James M. Carter,  
U. S. Attorney.

/s/ M. H. Goldschein,  
Special Assistant to the  
Attorney General.

Filed June 14, 1949.”<sup>2</sup>

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<sup>2</sup>Transcript of Record, pages 15 to 21, inclusive; see also pages 59 to 72, inclusive.

Although Healey denied that she had the books and records of the Communist Party of Los Angeles County or ever had such records [R. 70]<sup>3</sup> yet there is ample proof in the record that she had access to said records, knew their contents, and the Court could infer she must have known who did have them if she didn't.

One Government witness by the name of Adrean was called to testify in the hearing before the Court [R. 102-103]. He stated he was a graduate of the University of Southern California; that he joined the Communist Party here in June 1942 but resigned from it in 1947; that he was a club organizer and educational director of a couple of clubs, and that in connection with his activities in the Communist Party he learned the officers of the party in Los Angeles. Further, he testified that he knew Dorothy Healey and identified her in the courtroom [R. 106] that she was "Organizational Secretary and Membership Director" [R. 103]. That she has a controlling or executive position in the Communist Party [R. 104]; that she is in control of the day to day activities of the party; the membership and its officers [R. 105] that he had been in her office at 124 W. Sixth Street, in Los Angeles [R. 105]; that the head of the Los Angeles Communist Party was Nemmy Sparks whose title was "Chairman of the County Central Committee"; and Dorothy Healey was next in charge as "Organizational Secretary" [R. 107].

Adrean further testified that he had to report to her in order to be assigned to a club [R. 108]; also that under her comes the various sections of the party and they are

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<sup>3</sup>References preceded by the letter "R" refer to the Printed Record on Appeal.

headed by organizers, who serve as functional officers, too [R. 108]; further that they had a mimeographed sheet that came around on which he had to state his name or his Party name [R. 109]. Also, he stated that a statistical sheet was filled out containing information as to what his club location was, his occupation, whether he belonged to a fraternal organization, a trade union and whether he was a veteran—so that they would know how many people were located in a particular industry, or trade union in order to organize activities within these various organizations [R. 110]. The statistical data (sheet) is turned over to the club organizer and it was delivered through regular party channels [R. 111].

A subpoena *duces tecum* was served upon Healey to produce said books and records, memoranda and files of the party, particularly those showing membership in, or dues paid by members to the Communist Party of Los Angeles. She stated she did not have and never had any such records<sup>4</sup> [R. 70]. Then she was asked if she knew who had the books and records of the party (questions (2) and (31), of presentment [R. 17 and 19]) also questions 10 and 28 related directly to said records which questions Healey refused to answer on the ground that it might be self-incriminating [R. 61, 62 and 64].

Dorothy Healey did answer the question "Now, you are not a Federal employee, are you?" by saying, "I am not"

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<sup>4</sup>Since Healey never produced the records of the party, and maintained she did not have control over them, the demand to do so was not pressed and the Government's motion for an order of the court compelling production was taken off calendar. Therefore, non-compliance with the subpoena *duces tecum* to produce said records is not a basis of the contempt herein.

[R. 60], and that her husband was not and never has been a Federal employee [R. 68].

As to appellant Appelman the Grand Jury presentment contained certain questions which he refused to answer on the ground that the answers might tend to incriminate him, as follows:

“(1) ‘Do you know that Dorothy Healey is the organizational secretary of the Los Angeles County Committee of the Communist Party?’

(2) ‘Do you know who the chairman of the Los Angeles County Communist Party is?’

(3) ‘Do you know who the membership director of the Communist Party is?’

(4) ‘Do you know who the financial director of the Los Angeles County Committee of the Communist Party is?’

(5) ‘Do you know anything about the sections?’

(6) ‘Can you tell us whether each section has an organizer?’

(7) ‘Can you tell us the names of any of the section organizers of the Los Angeles County Communist Party?’

(8) ‘Can you tell us whether each section has a membership director?’

(9) ‘Where have you used that name (Matt Pelman)?’

(10) ‘Have you ever been to their offices in Los Angeles? (The Los Angeles County Committee of the Communist Party.)’

(11) ‘Did you know who was in charge when you were living here? (The Los Angeles County Committee of the Communist Party.)’ ”<sup>5</sup>

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<sup>5</sup>R. 2-6, inclusive.



A presentment similar to that pertaining to Healey and Appelman was made as to Averbuck, in which he refused to answer certain questions, claiming privilege, as follows:

“(1) What name is on the door (at 124 W. 6th St.)?”

(2) Do you know Mrs. Dorothy Healey?

(3) Mr. Averbuck, do you know who has the books and records of the Los Angeles County Communist Party?

(4) Now, do you know how many divisions of the Los Angeles County Communist Party there are?

(5) Do you know the names of any of the chairmen of any of the divisions of the Los Angeles County Communist Party?

(6) Do you know the names of the membership or social organizers of any of the divisions of the Los Angeles County Communist Party?

(7) Do you know the names of the financial organizers or financial directors of any of the divisions of the Los Angeles County Communist Party?

(8) Do you know the names of the officials of any of the divisions of the Los Angeles County Communist Party that have the books and records of that division of the Communist Party?

(9) Did you ever see Mrs. Dorothy Healey with any of the books or records of the Los Angeles County Communist Party?

(10) What did you say your occupation was?

Organizer.

For whom?”<sup>6</sup>

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<sup>6</sup>R. 6 to 10, inclusive.



A similar presentment was returned as to appellant Greenfield who claimed privilege and refused to answer the following questions:

“(1) ‘Now, do you know who has the books and records of the Los Angeles County Communist Party?’

(2) ‘Was that the first time you ever saw her? (Dorothy Healey.)’

(3) ‘Does she have the books and records of the Los Angeles County Party, do you know?’

(4) (Same question as #1.)

(5) ‘Mr. Greenfield, do you know whether or not the Los Angeles County Communist Party is divided up into divisions?’

(6) ‘Can you tell us how many divisions there are?’

(7) ‘Will you tell us whether or not each division of the Communist Party of Los Angeles County keeps books of the membership of that division?’

(8) ‘Will you tell us the names of the chairmen or organizers of these divisions?’

(9) ‘Will you tell us whether or not these divisions each have a membership or social director?’

(10) ‘Mr. Greenfield, we want to know the names of these people that hold these offices!’

(11) ‘Well, does each division have a financial director? If so, will you give us their names?’ ”<sup>7</sup>

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<sup>7</sup>R. 11 to 15, inclusive.

Also a similar presentment was returned against appellant Newman who refused to answer certain questions as follows:

“(1) ‘Do you know Dorothy Healey?’

(2) ‘Do you know her office address?’

(3) ‘Do you know her business or occupation?’

(4) ‘Now, what is your business address?’

(5) ‘Who are you educational director for?’

(6) ‘Do you know who the financial director is of the eastern division of the Los Angeles County Communist Party?’

(7) ‘Do you know who the membership or social director is of the eastern division of the Los Angeles County Communist Party?’

(8) ‘Now, who is the chairman of the Los Angeles County Communist Party?’

(9) ‘Who is the organizational secretary of the Los Angeles County Communist Party?’

(10) ‘Now, do you know whether or not the Los Angeles County Communist Party has a labor director?’

(10a) ‘Do you know whether or not they have a membership or social director?’

(11) ‘Do you know whether or not the membership or social director has a list of the membership of the Los Angeles County Communist Party?’

(12) ‘Do you know whether or not the Los Angeles County Communist Party has a financial director?’

(13) ‘Do you know whether or not the financial director keeps an account of the dues collected from the members of the Los Angeles County Communist Party?’

(14) 'Do you report to anybody who you see?'

(15) 'Do you know Dorothy Healey is the organizational secretary of the Communist Party of Los Angeles County?'

(16) 'Do you know whether Dorothy Healey has in her possession or under her control any books and records of the Communist Party of Los Angeles County?' ”<sup>8</sup>

The District Court, on its own motion, ordered these causes consolidated for trial, there being no objection to consolidation. The date set was June 23, 1949. All appellants were found guilty on June 28, 1949. Appel-  
man was sentenced to serve one year imprisonment; Aver-  
buck to pay a fine of \$10.00; Greenfield one year imprison-  
ment; Newman, one year imprisonment and Healey  
eighteen months [R. 28, 30 and 35 to 43, incl.].

### **The Questions Involved.**

1. Whether the privilege against self-incrimination extends to collateral and auxiliary testimony concerning books and records of an unincorporated association, such as the Los Angeles Communist Party?

2. Whether a witness before a Federal Grand Jury may invoke the privilege to shield and protect third persons connected with the Party?

3. Whether or not a witness may refuse to testify before a grand jury wherein—

A. He would have received automatic immunity by operation of law had he testified?

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<sup>8</sup>R. 22 to 26, inclusive.

B. He was expressly offered complete immunity from any prosecution by the United States Attorney and the office of the Attorney General?

4. Whether a witness may refuse to testify in the absence of a real danger of self-incrimination, and upon his own speculation of a remote and imaginary danger—

A. Is not contempt of Court complete, upon refusal to answer one single question, which a witness is bound to answer?

5. Whether a witness may involve the privilege of silence merely because his answer might connect him with the Communist Party of Los Angeles?

A. Whether the Party is an illegal organization?

1. Whether membership therein is unlawful?

(a) Where a witness was never asked whether or not he is a member—can he refuse to say whether or not he knows who are officers and members?

B. Whether the privilege is justified merely upon the opinion of the Attorney General that the Party is a subversive organization?

1. May a witness refuse to testify merely because of public statements of the United States Attorney?

C. Whether a prosecution under the Smith Act elsewhere in the United States against persons alleged to be Communists, is alone sufficient basis for the privilege of silence?

## ARGUMENT.

### Summary.

In the matter of the five appellant witnesses herein, there was a finding by the District Court that each and every one of them wilfully, deliberately and contumaciously obstructed the investigation of the grand jury by failing and refusing to answer the questions which were ruled to be proper and material in an inquiry pursuant to the loyalty program set in motion by a Presidential Executive Order. Each of the witnesses was told that he was not under investigation. Each of the witnesses was offered a broad and complete immunity by the United States Attorney and the Office of the Attorney General. Each of the witnesses, except Appelman, was offered an opportunity to be heard by the Court, privately in chambers, in order to explain how his privilege against self-incrimination would be violated by answering said questions. None of the witnesses availed themselves of that opportunity. Upon a hearing in open court, the witnesses were ordered to return to the grand jury and answer the questions. The Court found that there was neither a present nor real danger of self-incrimination by replying to the questions. Upon further refusal on the part of the witnesses based upon the privilege clause of the Fifth Amendment to the Constitution, the Court had another hearing and adjudged the appellants in contempt of court.

From that judgment these five witnesses have appealed. In substance, all of the questions are either auxiliary or collateral to the inquiry about the books and records of the Los Angeles Communist Party, except those put to Appelman, or deal with the identity of officers, or the nature of the organization of said party. In no case was



the witness asked whether he was a member of any Communist Party.

It is urged by the Government in this appeal that the issues raised be resolved against the appellants. First, it is urged that the privilege against self-incrimination does not extend to collateral and auxiliary testimony concerning the books and records of an unincorporated association, such as the Los Angeles Communist Party. Second, it is urged that a witness before a Federal grand jury may not invoke the privilege, which is personal to him alone, in order to shield and protect third parties who may or may not be connected with the Communist Party. Third, a witness may not refuse to testify before a grand jury wherein he would have received automatic immunity by operation of law had he testified, since under the decisions of the Supreme Court it is extremely doubtful that such testimony would be admissible. Further, it is inconceivable that once immunity has been offered by the Government that it would attempt to turn such evidence against any witness in breach of the good faith in which the assurance was given. Fourth, the appellants herein had no reasonable grounds upon which to claim the privilege of silence in the absence of a real and substantial danger of self-incrimination. They had no right to obstruct the investigation of the grand jury being conducted under the loyalty program based upon their own speculation of some remote and imaginary danger. By the failure to answer one single question which they were bound to answer, the judgment of contempt against every appellant should be sustained. It is submitted there is more than one question which each appellant witness should have answered.

Fifth, the appellants had no Constitutional right to assert the privilege merely because their answer might

connect them with the Communist Party of Los Angeles. Under existing Federal and State legislation and the prevailing rule announced by the Supreme Court, the Communist Party is not an illegal organization nor is membership therein unlawful *per se*. Furthermore, the prosecution of certain individuals elsewhere in the United States under the Smith Act, wherein the indictment alleged a conspiracy to overthrow the Government of the United States by force and violence, did not justify the privilege of silence herein although the defendants in that case were alleged to have organized the Communist Party. Furthermore, the opinion of the Attorney General and public statements of the United States Attorney in this district to the effect that the Communist Party generally was a subversive organization did not suffice to clothe them with the privilege since those statements did not have the force of law. Furthermore, guilt is personal and may not be imputed by association.

It is further submitted that a refusal to testify on the part of these appellants was neither justified in law nor in fact. Instead it was a subterfuge to protect others connected with the Communist Party, and in particular, those in the employ of the Government whom the grand jury had a right and duty to investigate. On the basis of National security, and in the face of world conditions as they are, the Government acting within its sovereignty, was justified in commencing this inquiry to ascertain the identity of disloyal persons. It is submitted that the District Court has been amply vindicated in evaluating the substance behind said inquiry and committed no error in finding these appellants in contempt. We now ask this Court to pierce the veil of subterfuge with which these appellants have clothed themselves thus far, and sustain these judgments.

## POINT I.

**An Officer of the Communist Party Has No Constitutional Right Under the Privilege Clause of the Fifth Amendment to Refuse to Testify Concerning the Books and Records of the Organization.**

**A. There Is Ample Proof in the Record That Dorothy Healey Was an Officer of the Los Angeles County Communist Party.**

The privilege against self-incrimination is a purely personal one and it cannot be utilized by or on behalf of any organization, such as a corporation; *Wilson v. United States*, 221 U. S. 361; *United States v. Watson*, 266 Fed. 736; *Brown v. United States*, 276 U. S. 134 at 142. Nor may the privilege be invoked to shield or protect an association, *United States v. White* (1944), 322 U. S. 694 at 699.

In their official capacity officers of corporations or unincorporated associations have no privilege against self-incrimination. The official records and documents of the organization that are held by them in a representative rather than personal capacity cannot be the subject of the personal privilege, even though production of the papers might tend to incriminate them personally (*White case, supra*). The Court said, further:

“Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.” (At p. 700, *White case*.)

In the *White* case a subpoena *duces tecum* was issued by the United States District Court during a grand jury investigation of irregularities in the construction of a Naval Supply Depot in Pennsylvania directed to a labor

union. An officer appeared but declined to produce the records upon advice of counsel. He was found guilty of contempt of court. This conviction was upheld in the Supreme Court. It was held that the custodian of a labor union's records has no constitutional right under the Fifth Amendment—to refuse to produce such records at a grand jury investigation, based upon the ground of possible self-incrimination, citing *Hale v. Henkel*, 201 U. S. 43, 50 L. Ed. 652 and 8 Wigmore on Evidence, 3rd Ed., Sec. 2259a.

A slight distinction must be pointed out here in that the subpoena *duces tecum* in the *White* case was directed to the Union. In the present case it was directed to Healey as an individual, but this was not pressed after she denied both possession and control over the Communist Party Records. Nor was she cited for contempt for failure to obey the subpoena *duces tecum*. However, she was then asked a series of questions about those records, where they were, and who had possession or control. She refused to answer questions (2), (10), (11), (12), (28), (30), and (31),<sup>1</sup> of the presentment, which dealt with the books and records directly.

The Court held Healey in contempt only after ample evidence had been produced that she was an officer of the Los Angeles Communist Party, from which testimony the Court could have inferred she had all information necessary concerning the existence and whereabouts of said

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<sup>1</sup>R. 17, 18, 19 (Presentment) and R. 60 to 72.



records. Therefore, by analogy the *White* case and the present one contains a distinction without a difference.

As for the other appellants, a similar line of questions was directed to them concerning the books and records of the Los Angeles Communist Party, with the exception of Appelman. Averbuck refused to answer questions (3) and (9)<sup>2</sup> as set forth in the presentment; Greenfield refused to answer questions (1) and (3) of the presentment; Newman refused to answer questions (11), (13) and (16) of the presentment about the books and records.<sup>3</sup>

In *United States v. Bryan* and *United States v. Fleischman*, decided May 8, 1950, Nos. 98 and 99, as yet unreported except in Advance Sheets for Volume 339, No. 3, of Supreme Court reports, the convictions were upheld for wilful default before the Committee on Un-American affairs of the House of Representatives.

Bryan was executive secretary and had custody of the records of an association known as the Joint Anti-Fascist Refugee Committee. A subpoena was issued to Bryan to appear, testify and produce certain records of the association. She appeared, admitted she had said records but upon advice of counsel refused to produce them upon the ground that the Committee had no constitutional right to demand them, and raised the defense at her trial in United States District Court for the District of Columbia that the committee lacked a quorum.

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<sup>2</sup>R. 8 and 9 and R. 78-82.

<sup>3</sup>R. 24-25; R. 86 to 98.



The Supreme Court waived aside the lack of quorum argument and sustained the conviction of default obtained in the trial court for violation of R. S. Section 102, 2 U. S. C. Section 192.<sup>4</sup> The defaults in the *Bryan* and *Fleischman* cases were similar to the contempt in the *Healey* case—except that they were harder cases. Compliance with the subpoena to produce books and records in the *Bryan* case required point action of the Refugee Committee.

And the Court held that to excuse default in such a case, the witness must show a modicum of good faith in responding to subpoena. Further, that when one accepts an office of joint responsibility in which compliance with lawful orders requires joint action by the board or body of which he is a member, he necessarily assumes an individual responsibility to act within the limits of his power, to bring about compliance with the orders. The fact that such witness has no individual control over the records was no defense.

The Court held in the *Fleischman* case that the fact that the organization here involved was an unincorporated association, rather than a corporation (as in the *Wilson* case, *supra*) was immaterial.

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<sup>4</sup>“ ‘11 Stat. 155, as amended, R. S. §102, 2 U. S. C. §192:

‘Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.’ ”

It further held at page 364, that in the absence of evidence that the witness made some effort to bring about compliance with the subpoena, or had some excuse for failing to do so, the evidence adduced by the government amply sustained the conviction.

The Court had this further to say in the *Bryan* case:

“Ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability, *cf.* *Journey v. MacCracken*, *supra*, or is impeding justice by not explaining what happened to them, *United States v. Goldstein*, 105 F. 2d 150 (1939).

“On the other hand, persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned. See, *e. g.*, *Blair v. United States*, 250 U. S. 273, 281 (1919); *Blackmer v. United States*, 284 U. S. 421, 438 (1932).

“Certain exemptions from the attending or, having attended, giving testimony are recognized by all courts. But every such exemption is grounded in

a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth. Dean Wigmore stated the proposition thus: 'For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'<sup>5</sup>

"Every exemption from testifying or producing records thus presupposes a very real interest to be protected. If a privilege based upon that interest is asserted, its validity must be assessed. Testimonial compulsion is an intensely practical matter. If, therefore, a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena. That such was the situation in this case does not admit of doubt. In the first place, if respondent had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that she state her reasons for noncompliance upon the return of the writ. \* \* \*

Of course, a limitation must be observed in these cases as to their application to the present *Healey* case.

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<sup>5</sup>Wigmore, Evidence (3d ed.), Section 2192.

A witness appearing before a Congressional Committee is given immunity by statute<sup>6</sup> from prosecution for testimony in any criminal proceeding, except for perjury.

However, we shall hereinafter show that Healey and the other appellants were given an automatic and effective immunity by operation of law. Also, the United States Attorney and the Special Assistant to the Attorney General expressly *offered each appellant witness* immunity as broad and complete as that given by any statute.<sup>7</sup>

In *Brown v. United States* (1928), 276 U. S. 134, a subpoena *duces tecum* had been served upon the witness personally to produce the books and records of an unincorporated association before the grand jury. This was an inquiry into alleged violation of the Sherman Act. He refused and upon presentment to the District Court, he urged the subpoena would result in unlawful seizure and *production of evidence against himself*. The Court found his claim of privilege to be without merit and ordered him to appear before the grand jury and produce the documents called for. He again refused and was held in contempt and sentenced to imprisonment.

In affirming the judgment the Supreme Court said on page 144:

“In any event it was Brown’s duty to produce the papers in order that the court might by an inspec-

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<sup>6</sup>“No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.” 18 U. S. C. 3486.

<sup>7</sup>See page 354 of Record in *Healey case*, No. 12283.



tion of them satisfy itself whether they contained matters that might incriminate. If he declined to do so, that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena.”

The Court further pointed out on page 145 that:

“The individual citizen may not resolve himself into a court and himself determine and assert the incriminating nature of the contents of books and records required to be produced,”

citing *Commonwealth v. Southern Express Co.*, 160 Ky. 1, 3—also *Ex parte Irvine*, 74 Fed. 954, 960; *United States v. Collins*, 145 Fed. 709, 712; *Mitchells case*. 12 Alb. Pr. 249, 260-261. And see generally, *Blair v. United States*, 250 U. S. 273, 282.

To restate one of the paramount issues of this case which may distinguish it from the *Kasinowitz* and the other allied cases in connection with this series, we have the question of whether or not a person called before the grand jury may refuse to testify concerning books or records of an unincorporated association, such as the Communist Party of Los Angeles. As set forth in the statement of the facts and the grand jury presentment referred therein as to questions which these appellants refused to answer, we find several in each case except *Appelman* that dealt with the custody, location and nature of the records and documents kept by that organization. It is urged herein that none of these appellants had a right under the Constitution or the laws of the United States to refuse to answer these questions. In support of this premise, numerous cases have been cited and the cases are legion in addition to those cited herein in support



of this position. Not only does a witness have no right to refuse to produce the books and records of a corporation, an unincorporated association or a labor union, but he has no privilege under the decisions in refusing to *testify about them collaterally*. Furthermore, it makes no difference whether the subpoena *duces tecum* was issued to them as an officer of the organization or whether it was issued to them as an individual. The rule is stated in our circuit in the case of *United States v. Lumber Products Association* (1942) in the District Court of the Northern Division of California, 42 Fed. Supp. 910 at page 916 as follows:

“Testimony identifying the documents and auxiliary to the production of them is as unprivileged as are the documents themselves. *United States v. Austin-Bagley Corp.*, 2 Cir., 31 F. 2d 229; *United States v. Illinois Alcohol Co.*, 2 Cir., 45 F. 2d 145, 149, certiorari denied 282 U. S. 901, 51 S. Ct. 214, 75 L. Ed. 794.”

That case was affirmed on appeal to this Court in 1944. See 144 F. 2d 546 and in particular at page 553, wherein Honorable Judge William Denman wrote the opinion for the Court and restated the rule of law as follows:

“The transcript of their testimony given before the grand jury is included within the record now before us. *Ryan v. United States*, 9 Cir., 128 F. 2d 551, 552. It shows that each identified the organizational records produced; that each was an officer or agent of his respective union, and that each outlined the organizational structure and relationships between the several unions. *None of such testimony is within*

*the area of immunity.* United States v. Greater New York Live Poultry C. of C., D. C. N. Y., 34 F. 2d 967, certiorari denied, 283 U. S. 837, 51 S. Ct. 486, 75 L. Ed. 1448.”

That case went to the Supreme Court and was reported in 330 U. S. 395, decided 1947, wherein this case was consolidated with a group of related cases. It was reversed on other grounds wherein the Court discussed at some length the conspiracy to violate the Sherman Anti-Trust Act on the part of the various defendants. The precise rule of law which we are urging here was apparently never considered or passed on by the Supreme Court in its opinion.

In the *Austin-Bagley Association* case cited by the District Judge and in the *Lumber Products Company* case (*supra*), 31 F. 2d 229 (1929), Circuit Judge Learned Hand at page 233 stated the law as follows:

“That the production of the books and documents could be compelled, even if they contained entries incriminating the accused, is now well-settled law. *Wilson v. U. S.*, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; *Wheeler v. U. S.*, 226 U. S. 478, 33 S. Ct. 158, 57 L. Ed. 309; *Grant v. U. S.*, 227 U. S. 74, 33 S. Ct. 190, 57 L. Ed. 423. Though they be in their very possession, even their property, it makes no difference; it is the semipublic character of the documents themselves which removes their inviolability, the fact that they record corporate transactions.”

Further on at page 234 that Court refers to the case of *Heicke v. United States*, 227 U. S. 131, and says that:

“Unless that case is to be disposed of on the theory that no such immunity was claimed, it necessarily

held that the privilege did not exist. Hence it appears to us that the case determines *that testimony auxiliary to the production is as unprivileged as are the documents themselves.* [Emphasis ours.] By accepting the office of custodian the holder not only exposes himself to producing the documents, but to making their use possible without requiring other proof than his own. All questions of immunity and the supposed misconduct of the district attorney in repeatedly demanding the documents in the jury's presence fall with the privilege. For this at any rate *Heike v. U. S.* is direct authority; 'we see no reason for supposing that the act offered a gratuity to crime' (page 142 (33 S. Ct. 228))."

See also *United States v. Illinois Alcohol Co.*, 2nd Circuit (1930), 45 F. 2d 145 at page 149, wherein the rule was stated again as follows:

"A person producing corporate books and records before a grand jury and giving testimony as to such production is not entitled to immunity under this section. Any testimony auxiliary to such production is unprivileged as are the documents themselves. *Wilson v. United States*, 221 U. S. 361, 384, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, *Dreier v. United States*, 221 U. S. 394, 31 S. Ct. 550, 55 L. Ed. 784; *U. S. v. Austin-Bagley Corp.*, *supra*;"

In the *Dreier* case cited above, the Supreme Court follows the *Wilson* case, *supra*, to the effect that an officer of a corporation cannot refuse to produce books and papers of the corporation in response to a subpoena *duces tecum* on the ground that the contents thereof would tend to incriminate him personally.

In the *Lumber Products Company* case, this Court cited the *New York Poultry Company* case, 34 F. 2d 967.

That case held that a witness subpoenaed to testify before the grand jury as to the books and records of a labor union of which he is an officer may be questioned in detail concerning said records, notwithstanding his claim of immunity from criminal prosecution by reason of so testifying. On page 968 of the opinion, the Court recited that the evidence discloses that the inquiry made by the District Attorney in charge of the grand jury investigation involved the question of books and records of Local 167 of which the defendant was an officer and secretary-treasurer at the time he appeared before the grand jury. He appeared in response to a subpoena *duces tecum* to present the books and records of that association. He failed to do so. Concerning this the Court said:

“This it would seem was a duty imposed upon the defendant which he could not evade under the rule in *Heike v. United States*, 227 U. S. 131, 33 S. Ct. 226, 57 L. Ed. 450, and other cases. *Neither do I believe that because the same subpoena was of a personal nature to the defendant should exempt him from giving testimony concerning the books, papers, and documents of the association of which he was an official.*” (Emphasis ours.)

On the matter of testimony before an administrative board wherein the investigation of books and records and activity of a corporation was being conducted, the case of *Consolidated Mines of California v. Security Exchange Commission* (Ninth Circuit), 97 F. 2d 704, 707, was cited with approval by the Fifth Circuit in *Zinser v. Federal Petroleum Board* (1945), 148 F. 2d 993. In the latter case the witness refused to answer questions before the Federal Petroleum Board investigating a matter under the Conally-Hot Oil Act. The board guaranteed immunity in event any answers would in any way



incriminate him. The witness still declined. The Court held, after considering each and every question propounded, that the Court below committed no reversible error in directing the witness to answer such questions.

## POINT II.

### The Privilege Against Self-Incrimination May Not Be Asserted on Behalf of Third Persons.

(1) The privilege clause of the Fifth Amendment was never intended as a cloak or a shield to protect other persons.

The Courts have held again and again that the Bill of Rights was added to the Constitution as a protection of individual liberty. The Fifth Amendment in particular established a personal right that may be asserted by and for an individual alone. It is a right that may not be assigned or delegated. It is vested as a life estate in each person whether a citizen of the United States or not. Therefore, it need not be and may not be asserted for or on behalf of any other person. As we have seen already, the privilege may not be claimed by a corporation (*Wilson* case, *supra*) nor by an unincorporated association (the *Bryan* and *Fleischman* cases, *supra*) nor by or on behalf of a labor union, *U. S. v. White*, 322 U. S. 694 (1944) at pages 701 and 704, because the union did not itself possess such a privilege.

The Court said at page 704:

“Moreover, the privilege is personal to the individual called as a witness, making it impossible for him to set up the privilege of a third person as an excuse for refusal to answer or to produce documents.”



Further at page 704, it said:

“The documents he sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. *No valid claim was made that any part of them constituted his own private papers.* (Emphasis ours.) He thus could not object that the union’s books and records might incriminate him as as officer or as an individual.”

It is submitted, therefore, that no political party possesses the privilege under the Fifth Amendment. It follows that no officer or member of such party may assert the privilege and rely upon it to escape contempt of Court.

It is further submitted that the District Court committed no error in finding Healey and the other appellants in this case guilty of contempt under the facts and circumstances contained in the record. Does it not boil down to the proposition that these appellants were not seeking to protect themselves so much as to shield other members as well as the Los Angeles Communist Party Organization. If we penetrate the veil of their subterfuge, was not their refusal to testify a convenient evasion of their duty to tell what they knew about the Party? Not only were they trifling with the powers of the grand jury to investigate, were they not obstructing the Government in the exercise of its undisputed sovereignty to ferret out the Hisses and the Fuchs in its employment who might betray secrets upon which their security depends?

In *Loubriel v. United States*, Second Circuit, 1926, 9 F. 2d 807 (cited with approval by the Supreme Court in the *Bryan* case, *supra*) Judge Learned Hand wrote as follows:

“The question is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance. We have not the least doubt of the power of the District Court to punish a witness for evasion patently put forward to avoid his duty. No doubt, since its exercise is drastic, it is to be used with caution, but at times no other means exists to prevent an entire miscarriage of justice.”

In that case *Loubriel*, the appellant was summoned before a New York grand jury upon subpoena and questioned about the disposition of certain alcohol. He was employed by one D who was a perfume dealer. The theory of the investigation was that he was disposing of D's products to persons for conversion into intoxicating beverages. Although he had traded with his customers 25 years, he claimed he did not know their names. The grand jury certified him to the Court for obstructing their investigation, and he was committed for contempt.<sup>1</sup>

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<sup>1</sup>The *Loubriel* case differs from the present one in that it was for civil contempt, and he was ordered discharged as the grand jury term expired. The Court said on p. 809, if he was to be punished, his punishment must be fixed (as in criminal contempt); if he were to be coerced, it might be only while the inquiry was on.

There was a case of patent evasion of duty to testify fully and truthfully, held to be contempt of court for the appellant was obviously protecting third parties, namely his customers. Here, by analogy Healey and the other appellants have used the device of privilege, not as the Constitution intended, but merely to throw a smoke-screen about their Communist fellow travellers, so that they might escape, especially those who may have been employed by some Government agency.

The Supreme Court in *Brown v. Walker*, 161 U. S. 591 (1896) reviewed the history of the privilege against self-incrimination. In that case the witness was called before the Interstate Commerce Commission under a subpoena to produce books, papers and documents. He refused on the ground that the production of said papers might tend to incriminate him. The statute provided that "No person shall be excused from attending and testifying or producing documents before the Commission but that no person shall be prosecuted on account of any matter concerning which he may testify or produce evidence in obedience to the subpoena." The Court held that the latter provision of the statute affords absolute immunity against prosecution, Federal or State, and deprived the witness of his Constitutional right to refuse to answer. After reviewing the evolution of the rule from the time it developed in England down through the Constitutional enactment in the American system, the Court had this further to say:

"Stringent as the general rule is, however, certain classes of cases have always been treated as not fall-

ing within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else—much less that it shall be made use of as a pretext for securing immunity to others.” \* \* \*

“The danger of extending the principle announced in *Counselman v. Hitchcock*<sup>2</sup> is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.”

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<sup>2</sup>142 U. S. 547.



### POINT III.

#### Appellants Would Have Obtained Automatic Immunity by Operation of Law, Had They Testified.

A. Any Testimony a Witness Is Compelled to Give Before a Grand Jury by Order of Court, Would Not Be Admissible Against Him in Any Criminal Proceeding, Except Perjury.

1. ANY CRIMINAL PROCEEDING MEANS—A PROCEEDING ARISING OUT OF PAST OFFENSES, IN RELATION TO THE TIME OF INQUIRY.

Under the doctrine of *McNabb v. United States*, 318 U. S. 332, any evidence against appellants thus obtained would be inadmissible in a criminal prosecution in any Federal Court. Any conviction had resting upon such evidence, that is involuntary, or coerced, would have to be set aside. The Court in that case said on page 340 that it has set aside convictions in both State and Federal Courts based upon confessions secured by “unconstitutional methods.” However, in Federal criminal trials, the rules of evidence are not restricted to those derived solely from the Constitution. The Supreme Court exercises supervision and authority over the administration of criminal justice in the Federal Courts (see page 341 of opinion) and it is inconceivable that it would allow any conviction to stand based in whole or in part on admission or testimony given before a grand jury, as against these appellants.

The case of *Anderson v. United States*, 318 U. S. 350, decided at the same time as the *McNabb* case—rests upon the same principles and considerations. In both cases the decision turned mainly on failure to take the defendants before a magistrate with delay by arresting



officers as required by United States statutes.<sup>1</sup> Instead confessions were obtained after long periods of detention and questioning before the taking of prisoners before a committing authority. Similar legislation appears in the statute books of nearly all the states.<sup>2</sup>

The fundamental rule of Evidence that any confession or admission must be voluntary before it is admissible in Court, is too well founded to require citation of authority, but see Wigmore, Volume III, Section 826, page 255, also Section 823, pages 248 and 249, and Section 2550, Volume IX, page 501.

Furthermore, should the United States Court of Appeals for this Circuit support the findings of the Trial Court, that appellants had no reasonable grounds to claim the privilege of silence, it is submitted that anything they did say under such circumstances, could never be used against them.

As it was stated in the beginning to each witness by the United States Attorney or the Special Assistant to the Attorney General, the object and purpose of the grand jury inquiry was to find out whether or not certain Government employees had made false statements.<sup>3</sup> Also, each witness was told expressly that he was not under investigation. It follows then that the Government in good faith was foreclosed to ever use any information

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<sup>1</sup>18 U. S. C. 595 then in effect. Repealed effective September 1, 1948; now covered—by Rule 5, Criminal Rules Federal Procedure.

<sup>2</sup>California Penal Code 1949, Sections 821-29, 847-49. See also footnote page 342 of *McNabb* opinion for reference as to other states.

<sup>3</sup>Loyalty Program pursuant to Executive Order of President, No. 9835, 12 Federal Register 1935, dated 1947. See Stanford Law Review, Volume 1, No. 1, November 1948, pages 88, 89.

obtained from these witnesses against them. It would be a cruel joke indeed if our Government, and in particular if the Department of Justice called a witness and gave him the above assurances, then turned around and used that information to prosecute him. Our Government does not do business that way. If these appellants or any of their friends hold a mental reservation of allegiance to some other Government that does operate that way, they have no reasonable ground to expect that kind of treatment in this country. It is believed that the District Court must have considered these assurances by the Government, among other circumstances, in holding that the direct answers to the questions asked of each witness could not possibly affect him in "any criminal proceeding."

The latter term was defined and explained in the *Bryan* case (*supra*) on pages 340 and 342 by the Supreme Court in its construction of Section 3486 of Title 18, U. S. C., as follows:

"The debates attending enactment of the statutes here in question and the decisions of this and other federal courts construing substantially identical statutes make plain the fact that Congress intended the immunity therein provided to apply only to past criminal acts concerning which the witness should be called to testify." \* \* \*

"\* \* \* There is, in our jurisprudence, no doctrine of 'anticipatory contempt.' While the witness' testimony may show that he has elected to perjure himself or commit contempt, he does not thereby admit his guilt of some past crime about which he has been summoned for questioning but commits the criminal act then and there.

“In *Glickstein v. United States*, *supra*, this Court considered the problem thereby presented. It was there held that perjury committed in the course of testimony given pursuant to statute falls outside the purview of §7 (9) of the Bankruptcy Act, 11 U.S.C. § 25 (10), which, like R. S. § 859, provides that no testimony given by the witness (at a creditors’ meeting) shall be used against him in any criminal proceedings. In the Court’s view, such an immunity ‘relates to the past and does not endow the person who testifies with a license to commit perjury.’ 222 U. S. at 142. The distinction is fully spelled out in a Circuit Court of Appeals opinion, *Edelstein v. United States*, 149 F. 636 (1906), which was cited with approval in the *Glickstein* case:”

“\* \* \* The words, ‘any criminal proceeding’ cannot sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony. They obviously have reference to such criminal proceedings as arise out of past transactions, about which the bankrupt is called to testify.” 149 Fed. at 643-644.

It is submitted that the same construction should and would be given by that Court as to the meaning of the phrase “in any criminal proceeding” as used in the Fifth Amendment.

Therefore, it is urged herein that the same kind of effective immunity existed on behalf of these appellants in this case as prevailed under the statute that protects witnesses who appear before Congress, or any committee thereof. As a practical matter, nothing they might have said could ever be used against them in a trial arising out of any past criminal activities, if there were such. Since

the grand jury investigation is a secret inquiry, it is difficult to see how their testimony could ever be available for use before State or Municipal Courts. However, it is not contended that appellants were given a license to commit perjury by testifying falsely before the grand jury—any more than before a Congressional Committee. Neither did they have a right to obstruct the grand jury investigation by refusing to state, if they knew, which books and records were kept by the Los Angeles Communist Party. Nor did they have a right to refuse to admit or deny they knew who the various captains and lieutenants of the local party were.

It is not controverted herein that the grand jury was duly constituted or that it had a right and duty to make this investigation. Early motions in the case, however, throw considerable doubt on the sincerity and good faith of appellants in urging the privilege of silence now.

In the beginning the witnesses in all these cases took the position, first, that the grand jury was not conducting a bona fide investigation within the scope of its powers. They urged that the Attorney General instituted the inquiry solely to advance the political interests and fortunes of those whose tenure of office depended upon the political campaign for the presidency of the United States at that time.<sup>4</sup>

Secondly, they urged that the witnesses were subpoenaed by the Attorney General and his assistants not for the purpose of conducting a bona fide grand jury investigation, but for the purpose of harassing certain individuals believed to be members of the Communist Party. These attacks were made before the witnesses

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<sup>4</sup>Kasinowitz Record, Volume 1, page 63.



appeared before the grand jury upon a motion to quash the subpoenas, and before said witnesses could have known the word "Communist" had been used in any way by counsel for the Government, or before the grand jury.<sup>5</sup>

Thirdly, the appellants attacked the composition of the grand jury and urged that it was improperly selected and that there were material departures from the form prescribed by law in the matter of the selection of the grand jury. They urged that it was not an impartial grand jury drawn from a cross-section of the community in that certain groups of the community were excluded, namely, the laborers and domestic workers who were thus discriminated against, but that it was drawn from property owners, managers and officials of the so-called upper or middle class strata of society.<sup>6, 7</sup>

In *Blair v. United States* (1919), 250 U. S. 273 Supp. 281 and 282, the Supreme Court answers these contentions for all time by saying:

\* \* \* "It is clearly recognized that the giving of testimony and attendance upon the court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned.

\* \* \* The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. \* \* \* The duty so

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<sup>5</sup>Kasinowitz Record, Volume 1, page 64.

<sup>6</sup>Kasinowitz Record, Volume, pages 62, 63. See also Volume 4 of same record, page 20.

<sup>7</sup>See page 6 of appellants' brief in the present case of *Healey, et al.*, No. 12283, wherein it is shown that the Court below ordered the entire record in all of these cases be incorporated in and deemed a part of the record in this case.



onerous at times, yet so necessary to the administration of justice \* \* \* is subject to mitigation in exceptional circumstances; there is a Constitutional exemption from being compelled in any criminal case to be a witness against one's self, entitling the witness to be excused from answering anything that will tend to incriminate him (See *Brown v. Walker*, 161 U. S. 591) \* \* \*. But aside from exceptions \* \* \* the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry. \* \* \* He is not entitled to urge questions of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. (*Nelson v. U. S.*, 201 U. S. 92, 115.)

“On familiar principles he is not entitled to challenge the authority of the court or the grand jury provided they have a *de facto* existence or organization. \* \* \*

“And for the same reasons witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject matter under investigation. In truth it is in the ordinary case, no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction.”

The *Blair* case appears to be one of the great cases on the function of the grand jury and the compulsion of witnesses as an incident of the judicial power of the United States. The historical background of the process should make the case required reading in every law school. From it we may conclude that appellants have no standing to question the object and purpose of the grand jury investigation.

The Court said further on page 282:

“That a witness is not entitled to set limits to the investigation that a grand jury may conduct. The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers of the British prototype. \* \* \* It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of *propriety* and *forecasts* (emphasis ours) of the probable result of the investigation or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury’s labors, not at the beginning.” *Hendricks v. United States*, 223 U. S. 178, 184.

**B. The Appellants Herein Were Expressly Offered a Broad and Complete Immunity From Any Prosecution Arising Out of Their Testimony Herein by the United States Attorney and the Special Assistant to the Attorney General.**

The record in this case discloses that the United States Attorney and the Special Assistant to the Attorney General offered these witnesses a broad and complete immunity from any prosecution whatsoever that might arise from their testimony in this case. On page 354 of the printed record in the *Healey* case, we have the following statements extracted from the record:

“The Court: I have pending before me these criminal informations. I take it that your offer of immunity now means that in the event that the witness—is that made to each one of these witnesses?

Mr. Carter: It is made to each witness and in substance the offer is this: If there has been any misunderstanding on the part of the witness and the witness signifies his intention of appearing before the grand jury and answering these questions based upon the offer of immunity, the United States Attorney would move this court, subject to the court’s approval, to terminate these proceedings on contempt.

The Court: To dismiss them?

Mr. Carter: To dismiss the contempt, so we will have the record clear as to what our intention was.

\* \* \*

The Court: I think that is about as broad as any statement of immunity can be made, if that is your point, that it (106) is not broad enough.

Mr. Margolis: That is one point, your Honor, and I want to state again, if your Honor will look at the Counselman case and the Brown case once

more, your Honor will find that the immunity must be against prosecution concerning the subject matter of the testimony, not as the result of anything which the testimony will lead to.

The Court: I do not see how he could have said it any clearer.

Mr. Margolis: What he could have said is, that you are going to be asked to testify concerning the subject, that you cannot be prosecuted with respect to the subject concerning which you testify. You simply cannot be prosecuted with respect to that subject, and the immunity we ask has to be so broad that even if they obtain the lead from some other place, other than this defendant, there can be no prosecution. That is what the cases hold, and some of the earlier statutes which didn't go that far were held to be insufficient.

However, whether or not your Honor holds—

Mr. Goldschein: May I interrupt just a moment, please, sir?

May it please the court, so that the court will understand exactly what it was intended to do, that was the exact intent and purpose of the offer, that the witness would not be prosecuted. (107.)

The Court: I understand the language. It seems to me that it is as broad as it could be made."

Thus far we have considered the Government's theory that the appellants would have obtained automatic immunity by operation of law had they testified under the Court's compulsion. The Court found that the answers to the direct questions could not have incriminated them. The Court so found in view of all of the circumstances and it has been urged that had they so testified, none of that testimony could have been used against them in any



criminal proceeding. A second phase of the immunity has been set forth above in the extracts from the record. Therein direct immunity was offered by the Government in the broadest and most complete way possible. In support of that immunity, the Court of Appeals for the Third Circuit in *United States v. Levy* (1946), 153 F. 2d 995, had this to pay on page 997:

“(3-5) Since ancient times government officials have been granting accomplices immunity from prosecution in return for testimony as to criminal transactions. In the United States the courts have held that only an equitable right to immunity exists unless a statute expressly authorizes a grant of immunity in the particular situation. Whiskey Cases, 1878, 99 U. S. 594, 25 L. Ed. 399; *Mattes v. United States*, 3 Cir., 1935, 79 F. 2d 127; *United States v. Weinberg*, 2 Cir., 1933, 65 F. 2d 394; *Sherwin v. United States*, 5 Cir., 1924, 297 F. 704. Indirectly, the cases establish the right of a government to grant immunity in the absence of specific statutory authority therefor. We hold that the admission of the testimony of the three witnesses who were promised immunity was not error.”

The position of the United States Attorney, his duties and obligations not only to the Government but to defendants generally was set forth in a classic exposition by the Supreme Court in *Berger v. United States* (1935), 295 U. S. 78 at page 88 as follows:

“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that



justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."

#### POINT IV.

#### **Appellants Had No Reasonable Grounds to Claim Privilege of Silence Concerning the Los Angeles Communist Party Organization or Its Officials.**

The basic rule or principle of Law by which the privilege of silence has been measured and tested for almost one hundred years was laid down in the English case of *Regina v. Boyes*, 1 B & S 311, 321. There Cockburn, C. J., said to entitle the witness to the privilege of silence, the Court must see from the circumstances of the case and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Further, the danger must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things; not a danger of imaginary and unsubstantial character having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

While the object of the law is to afford a witness protection against being penalized by his own evidence, yet it would be an abuse of such protection to hold that a merely remote, imaginary and naked possibility of danger, was sufficient to justify the withholding of evidence essential to the ends of Justice.<sup>1</sup>

The witness may not decide for himself when and if the privilege may be invoked and thus set himself up as the sole and exclusive judge of alleged danger. When the privilege is asserted, it must be assessed, and the exemption from testifying presupposes a very real interest to be protected,<sup>2</sup> and it was said by Chief Justice Marshall in Burr's trial in 1807,<sup>3</sup> Robertson's Rep. I, 243, that:

“\* \* \* there is no distinction which takes from the Court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could in any degree affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. . . . When two principles come in conflict with each other, the Court must give them both a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable

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<sup>1</sup>See Wigmore, Volume VIII, page 405.

<sup>2</sup>*Bryan* case, page 332, *supra*.

<sup>3</sup>See Wigmore, Volume VIII, page 405.

extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which, it is conceived, Courts have generally observed; it is this: When a question is propounded, it belongs to the Court to consider and decide whether any direct answer to it can implicate the witness; if this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law."

See also *Brown v. Walker* (1896), 161 U. S. 591 at 597 and *Blair v. United States* (1919), 250 U. S. 273 at 281, also *Mason v. United States* (1917), 244 U. S. 362 for restatement and application of the general rule laid down in these early landmark cases.

In the *Mason* case, the grand jury was investigating a change of gambling at Nome, Alaska, against six men other than the witness. Mason refused to answer two questions claiming that it might tend to incriminate him, namely, (1) was there a game of cards being played at the table where you were sitting?; and (2) was there a game of cards being played at another table at this time?

The foreman of the grand jury reported the facts to the Judge who heard the witness and held the questions would not tend to incriminate the witness, then directed him to return to the grand jury and make reply.

After appearing there, Mason again refused to answer the first question, the second he said: "I don't know." A second presentment followed, a hearing, and the witness was held in contempt.

The Supreme Court affirmed the District Court after reviewing both the trial of Aaron Burr, *In re Willie*, 25 Fed. Cas. No. 14692e, pages 38, 39, and the doctrine of Chief Justice Marshall referred to herein alone. Mr.

Justice McReynolds, in this opinion for the Court discusses the case of *The Queen v. Boyes* (1861), 1 B & S 311, 329, 330, in which Cockburn, C. J., laid down the classic rule of privilege against self-incrimination. He concluded that the Constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law" and cited *Brown v. Walker*, 161 U. S. 591, 599, and 600.

The Court had this further to say:

"The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fortified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

"In the present case the witnesses certainly were not relieved from answering merely because they declared that so to do might incriminate them. The wisdom of the rule in this regard is well illustrated by the enforced answer, 'I don't know,' given by Mason to the second question, after he had refused to reply under a claim of constitutional privilege.

"No suggestion is made that it is criminal in Alaska to sit at a tabel when cards are being played



or to join in such game unless played for something of value. The relevant statutory provision in §2032, Compiled Laws of Alaska, 1913, copied in the margin. (Sec. 2032.)

“The court below evidently thought neither witness had reasonable cause to apprehend danger to himself from a direct answer to any question propounded and, in the circumstances disclosed, we cannot say he reached an erroneous conclusion.”

The *Mason* case stands for three propositions at least: First, that refusal to answer one single question that a witness is bound to answer may constitute contempt of Court; he need not refuse a dozen or so. Second, that the Trial Court being in the best possible position to evaluate the danger of self-incrimination on the part of a witness should be sustained unless there is a gross abuse of his discretion. Thirdly, yes or no answers to questions that would disclose association with others under inquiry are not sufficient to create a real danger, but it was so remote and speculative a possibility as to foreclose the privilege of silence.

The *Mason* case was cited by the Court of Appeals for the Second Circuit in *O'Connell v. United States*, 40 F. 2d 201 at 204. There a witness refused to answer questions before the Federal grand jury investigating the Albany baseball pool. He was asked: (1) Do you know, a place in Albany, called Malloy's?; (2) Is Malloy's at the corner of Van Zant and Hamilton Streets, Albany?; (3) Do you know a man by the name of Malloy? He refused to answer on the ground of self-incrimination.



The Court observed on page 204 that “many of the questions were merely whether he was acquainted with certain persons. A yes or no answer to such questions could have no direct tendency to incriminate him. The danger was much more remote than in *Mason v. United States, supra.*”

The close parallel between the case of appellants herein and the two above cases becomes apparent now. The District Judge ruled again and again in these cases that it is no crime to know somebody.<sup>4</sup> Appellants other than Healey were asked. Do you know Dorothy Healey—, her business address, her occupation, who the chairman of the Los Angeles Communist Party is—or its various directors? Healey was asked whether the Party had a chairman, who its directors are in addition to inquiry about books and records. Obviously most of the questions call for yes or no answers. The appellants did not reply they didn't know as Mason did to his second question. It is submitted that the District Court committed no error in ordering the appellants to answer one or more of these questions before the grand jury. Their refusal to do so, therefore, not resting on any reasonable basis in law or fact, constituted a clear case of contempt.

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<sup>4</sup>Page 276, Volume II, of printed record in *Kasinowitz* case says:

“The Court: A further ground and basis for my ruling is that it is immaterial whether Dorothy Healy is secretary of the Communist Party or is the Communist Party. As I have heretofore ruled, that is no crime, to know anybody.”

## POINT V.

### The District Court Committed No Error in Ordering Appellants to Answer the Questions Before the Grand Jury.

#### A. Appellants Were Not Entitled to Assert the Privilege of Self-Incrimination on the Possibility That Answers to the Questions Might Connect Them With the Communist Party.

1. The Communist Party as such is not an illegal organization.
2. Neither the Smith Act nor any other law of the United States outlaws the Communist Party.  
(a) Membership therein is not unlawful.
3. The claim of privilege was not justified by any statements by the Attorney General or the United States Attorney, not having the force of law.
4. The prosecution of certain individuals elsewhere under the Smith Act, or other laws of the United States, was not adequate basis for the privilege.

The Communist Party as such is not an illegal organization, the conclusions of counsel for the appellants on page 323 of the printed record in the present case (No. 12283) to the contrary notwithstanding. At that page counsel was referring to the defendants' Exhibit "A" which was marked for identification at page 321 and apparently was not received in evidence as the record seems to indicate that the Court could take judicial notice of the contents therein. Defendants' Exhibit "A" dealt with 100 questions and answers prepared by the Committee on un-American Activities in the United States House of Representatives. It was the conclusion of counsel that this document indicated that the Communist Party is an

illegal organization in the opinion of a Government agency.

Further reference is made by appellants' counsel concerning defendants' Exhibit "B" admitted in evidence at page 344 of same record. Although this document purports to be a report of the Department of Justice in the field of internal security, it was dated June 15, 1949, long after the appellants refused to answer the questions before the grand jury. This was admitted into evidence over Government's objection. It would appear to be an error of Court in favor of the appellants, if any error was committed. It was urged by the Government that said appellants could not have been influenced in their refusal to testify at the time they did refuse, based upon the contents of this document. In the beginning, it refers to the policy of the Department of Justice to the effect that the Communist Party is a subversive organization. Although it has been urged by the Government at all times herein that the inquiry of the grand jury was instituted pursuant to the loyalty paragraph pursuant to Executive Order No. 9835 at Volume 12, Federal Register, page 1935, dated March 25, 1947,<sup>1</sup> yet it is contended by appellants herein that the purpose and objectives of the grand jury investigation was to prosecute the Communist Party and its members generally throughout the United States. The record further contains references to public statements of the United States Attorney on the subject of Communism generally and attempts, by its members, to carry on subversive activity while hiding behind the bulwark of the Constitution and its guarantees.<sup>2</sup>

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<sup>1</sup>See Appendix A for Executive Order No. 9835.

<sup>2</sup>Pages 166-167, Record, *Healey* case.

Notwithstanding the contention of appellants herein, the position that the Communist Party as such is an illegal organization is untenable, granting for the purpose of argument that the Department of Justice has reported this group as being subversive. However, the Attorney General and the various United States Attorneys over the United States are entitled to no greater force of opinion than attorneys for defendants that appear in Court.

Therefore, the opinions of the Attorney General and/or the United States Attorney do not have the force of law, but are merely statements of policy or the view of the Government at the time on a particular problem.

Our attention has been directed by the appellants to the prosecution of certain alleged Communists in New York under the Smith Act. Record reference to this prosecution may be found at page 344 of said record also contained in defendants' Exhibit "B". They urge that this particular trial alone is sufficient basis upon which the appellants may assert their privilege of self-incrimination in the grand jury proceeding herein. However, in that case, namely, *United States v. William Foster, et al.*, 9 F. R. D. 365, also found in 83 Fed. Supp. 197, D. C. N. Y.,<sup>3</sup> we find the law given to the jury as follows:

"(32) Request No. 38. I charge you that you cannot find any defendant in this case guilty of the crime charged against him merely from the fact, if you find it to be a fact, that he *associated* with any other defendant or defendants whom you may find guilty of the offense charged.

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<sup>3</sup>*Foster, et al. v. U. S.* now affirmed by U. S. Court of Appeals for Second Circuit (     ) F. 2d (     ), August 1950.



“(33) Request No. 39. I charge you that under our system of law, guilt is purely personal and that you may not find any of the defendants guilty *merely by reason of the fact that he is a member of the Communist Party of the United States of America* (emphasis ours). no matter what you find were the principles and doctrines which were taught or advocated by that Party during the period defined in the indictment. \* \* \*

“(37) Request No. 275. I charge you that the statute under which the defendants were indicted does not prohibit the teaching or advocacy of peaceful change in our social, economic or political institutions, no matter how fundamental or far-reaching or drastic such proposals may be.”

It must be observed that these instructions were submitted on behalf of the defendants, and the Court ruled them to be proper by instructing the jury on the law of that case. In addition to the above, the Court instructed, on page 393, that it was not enough for the prosecution to show the existence of an agreement and the membership therein of any particular defendant. This alone did not prove that the defendant participated in the agreement knowingly and wilfully. The jury was further instructed that if they were not convinced beyond a reasonable doubt that such defendant acted wilfully, the verdict must be not guilty. Instruction was given on the word “revolution” to the effect that in its broadest significance it is used to designate a sweeping change as applied to a political change that it denotes a change in a system of Government, and though it is frequently accompanied by violent acts, it need not be violent in its methods. It does not necessarily denote force or violence. The prosecution in the *Foster* case was based



primarily on the Smith Act which makes it unlawful for any group to organize or conspire to urge the overthrow of the Government in the United States by force and violence, or to become a member of or affiliate with such society or group of persons knowing the purposes thereof.<sup>4</sup> The Smith Act now appears in 18 U. S. Code, Section 2385.

In that trial, it was incumbent upon the Government to prove beyond a reasonable doubt that the particular defendants involved had conspired or organized, agreed or associated themselves together for the purpose of advocating and overthrowing the Government of the United States by force and violence. The essence of the trial was not to prove the defendants were members of the Communist Party though it may have been alleged in the indictment that they organized the Communist Party. It is submitted that Judge Harold R. Medina, who attained considerable national stature as a trial judge,<sup>5</sup> in this case stated the law correctly when he instructed that "you may not find any of the defendants guilty merely by reason of the fact that he is a member of the Communist Party." It is submitted that if it were proven beyond a reasonable doubt that one or more persons conspired and agreed to overthrow the Government of the United States by force, it would not matter whether they were members of the Republican, Democratic or Communist Party, or for that matter, were simply members of a labor union or an extraneous organization in the United States. In Defendants' Exhibit "B" it is stated on page 352 of the record

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<sup>4</sup>See Appendix B for pertinent parts of Smith Act.

<sup>5</sup>See Saturday Evening Post for August 12, 1950, page 17, "The Ordeal of Judge Medina," by Jack Alexander.

that the Attorney General, after an exhaustive and thorough investigation, has listed a total of 159 organizations in the United States as hostile and inimical to our Government and our way of life.

In the *Foster* case, *supra*, Judge Medina gave an instruction at the request of the prosecution on the *Schneiderman* case at page 394 as follows:

“Request No. 34. During the course of the trial there have been various references to the Opinion of the Supreme Court in the case of *Schneiderman v. United States*, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796. That case was not a prosecution under the statute involved here and the Supreme Court did not determine any issue which is before you for determination.”

That case was cited by the United States Court of Appeals for the Tenth Circuit in *Blau v. United States* (C. C. A. 10), 180 F. 2d 103 at 104 and 105, January 31, 1950 (certiorari granted on May 15, 1950, No. 22, October Term, 1950), for the proposition that the decisions of the Courts presently are to the effect that membership in the party is not of itself an offense. Also, the case of *Dunne v. United States*, Eighth Circuit, 138 F. 2d 137, was cited for the same proposition. Here it may be noted that the position of Patricia Blau was almost identical to that of Dorothy Healey in the present case in that both refused to answer questions before the grand jury on the ground that the answers might tend to incriminate them. She referred to the indictments outstanding against the eleven or twelve party leaders in New York as indicating to her a danger of prosecution if she should testify and answer questions that were put to her before the grand jury. A distinction between the *Foster* case and the *Healey* and

*Blau* cases is readily apparent from the last page of Defendant's Exhibit "A" marked for identification, wherein the doctrine of William Z. Foster is set forth in black and white. This appears opposite page 323 of the present record as follows:

"No Communist, no matter how many votes he should secure in a national election, could, even if he would, become President of the present government. When a Communist heads the government of the United States—and that day will come just as surely as the sun rises—the government will not be a capitalist government but a Soviet government, and behind this government will stand the Red army to enforce the dictatorship of the proletariat."

Obviously, this preaches the doctrine of the overthrow of the Government of the United States by force and violence and, therefore, is within the teeth of the Smith Act.

In *U. S. v. Lovett* (1946), 328 U. S. 303, at page 315, the Supreme Court declared that Legislature Acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Punishing individuals on the basis of membership in the *Communist* Party also constitutes an imputation of guilt by association. Constitutional doubts about the use of guilt by association as a basis for criminal prosecution have been raised by a recent dictum of the Supreme Court in *Bridges v. Wixon* (1945), 326 U. S. 135, at 163 (concurring opinion); also see *Schneiderman v. U. S.*, 320 U. S. 118, 136 (1943).

In the *Wixon* case, Mr. Justice Murphy contends that the deportation statute is unconstitutional as ignoring \* \* \* the traditional American doctrine requiring personal guilt rather than guilt by association. The Court held in this case that *actual adherence* to the unlawful purpose of an organization must be shown, despite the statutory specification that mere affiliation is sufficient.

The *Schneiderman* case arose out of a denaturalization proceeding, which canceled a certificate of citizenship. It was based upon illegal procurement twelve years after it was given, on the ground that petitioner concealed his affiliation with the Communist Party, from the Naturalization Court. He came from Russia in 1908 and in 1922 became a charter member of the Young Workers (now Communist) League of Los Angeles and remained a member until 1930. In 1924, he filed a declaration of intention to become a citizen and his certificate of citizenship was issued in 1927 by the United States District Court for the Southern District of California. In 1925, he had become a member of the Workers' Party, the predecessor of the Communist Party, and his membership continued until the date of the Court's decision in 1943, at which time he was a member of the Party's National Committee and was Secretary of the Party in California. He became organizational secretary of California in 1930, and was the Party candidate for governor in 1932, in Minnesota.

The petitioner denied that he or the Party advocated the overthrow of the Government of the United States by force and violence and that he was not attached to the principles of the Constitution.

The District Court held that the certificate was illegally procured because the organizations to which petitioner



belonged were opposed to the Constitution, and that they taught and advocated overthrow of the Government by force and violence, and petitioner by reason of his membership and participation in their activities was not attached to the principles of the Constitution.

This Circuit Court affirmed on the ground that the certificate was illegally procured, holding that the finding that petitioner's oath was false was not "clearly erroneous."

The Supreme Court reversed all judgments below and held that the Government failed to prove that petitioner's belief on the subject of force and violence were such that he was not attached to the Constitution in 1927. On page 148, the Court said that it had *never passed upon the question, whether the Party does so advocate* (emphasis ours) (overthrow of the Government by force and violence) and it is unnecessary for us to do so now.

It pointed out on pages 154 and 155 that the Government's case was subject to the infirmities of proof by imputation, and its difficulties were increased by the fact that there is no accurate test of what a political party's principles are; that in effect a political party's writings, platforms and programs contain the exaggerated puffing of salesmanship, that bend as the sapling in the face of times and places and issues of the day; that such programs unfortunately are quite often as much honored in the breach as in their observance.<sup>6</sup> Furthermore, the Justices humanly admit they would have to deny their experience as men to recognize official party programs otherwise. The

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<sup>6</sup>Citing Bryce, the American Commonwealth (1915), Volume II, page 334.



Court adds that on the basis of that record, it cannot say that the Communist Party is so different in this respect that its principles advocate with clarity the overthrow of the Government with force and violence.

A footnote on page 154 quotes Mr. Justice Hughes (then Mr.) in opposing the expulsion of the Socialist members of the New York Assembly (1920) by saying:

“It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of or to the mere intent in the absence of overt acts.”

Thus, in the case of Healey and the other appellants, they could have no fear of prosecution by reason of this association with the Los Angeles Communist Party. Nor could they invoke the privilege of silence because certain backers of the party were under indictment or pending trial in New York charged with violations of the Smith Act (*U. S. v. Foster, supra*). As the Court said on page 154 of the *Schneiderman* case “Every utterance of party leaders is not taken for party gospel.” Had their testimony before the grand jury disclosed they were members or even officers in the party, it would not have been incriminating. Any prosecution would have to prove not only that the organization advocated the overthrow of Government by force and violence, but that they individually adhered to, advocated or taught such principles, since guilt is personal and may not be imputed by association. Also, before a confession or admission can be introduced in evidence, the *corpus delicti* or body of the crime must be proved, by the weight of authority, which requires no citation. Also, to prove a conspiracy there must be alleged and proved one or more overt acts in furtherance of the

conspiracy to violate some law of the United States. In the cold and realistic analysis of criminal trial practice and procedure—no case could be developed as proved against these appellants from direct yes or no answers to many of the questions herein put to them. Certainly no privilege attached to questions like “Who is Jane Doe? Where does she work? What is her organization? Who is the head of this or that organization or its divisions? or Who has the books and records of any association, if you know?”

Neither can appellants find solace or comfort in other laws of the United States by which to bolster their claim of privilege under these facts.

The McCormack Act of 1938<sup>7</sup> requires agents of foreign principals to register. Registrants must disclose identity of foreign principal, extent of control by foreign Government or political parties, and identity of employees plus information concerning organization and financial affairs. Exempt from the act are those engaging in *bona fide* religious, scholastic or scientific pursuits or fine arts. It is noteworthy that the Communist Party of the United States has neither registered nor has it been prosecuted for failure to register.<sup>8</sup>

The Voorhis Act of 1940<sup>9</sup> is designed to reach subversive organizations and requires registration of those (a) subject to foreign control which engage in *political activity* the aim of which is control by force or overthrow

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<sup>7</sup>52 Stat. 631 (1938) as amended, 22 U. S. C. Sections 611-21 (1946).

<sup>8</sup>Volume 1, No. 1, Stanford Law Review, November 1948, page 94, “Control of Communist Activities.”

<sup>9</sup>54 Stat. 1201 (1940), 18 U. S. C., Sections 14-17 (1946).

of the Government of the United States; (b) organizations subject to foreign control which engage in *military activity*, or threats of overthrow by force and violence. Since the registration requirement depends upon proof of purpose to overthrow the Government, the Communist Party of the United States has not been compelled to register nor has it done so under this Act.<sup>10</sup>

The Alien Registration Law of 1940<sup>11</sup> provides for registration on the part of every alien in the United States, disclosure of activities and fingerprinting.

Besides Federal legislation set forth above, the powerful disclosure device of investigation by the House Committee on un-American Activities has been put to considerable use of late.<sup>12</sup> In the case of *Lawson and Trumbo v. United States*, 176 F. 2d 49, cert. den.; 339 U. S. No. 2 Adv. Sheets at 934 (1950), the Hollywood Ten refused to answer questions before the Committee on whether or not they were Communists, and were held in contempt. Congress acting under its investigative powers for purposes of legislation proceeded upon the premise that the motion picture industry is affected with a public interest in that it is a powerful medium for education or propaganda. The ten writers, being within a key position in the industry, claimed the privilege, notwithstanding their statutory immunity.<sup>13</sup>

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<sup>10</sup>Page 94, Stanford Law Review, Volume 1, No. 1, November 1948.

<sup>11</sup>54 Stat. 670 (1940), 8 U. S. C., Sections 451-60 (1946).

<sup>12</sup>For possible Constitutional limitations on the activities of this committee, see Landis, in 40 Harv. L. Rev. 153 (1926). Also see 47 Columbia L. Rev. 416 (1947) and 33 Cornell L. Quarterly 565 (1948).

<sup>13</sup>See 18 U. S. C. 3486 (*supra*).

In a well considered and excellent article in the new Stanford Law Review on "Control of Communist Activities," Volume 1, No. 1, for November 1948, pages 85-107—both State and Federal legislation as well as many recent cases dealing with the Communist Party are reviewed. It points out on page 95 that the California Subversive Organization Registration Law<sup>14</sup> passed in 1941 appears to be the only state legislation requiring registration of organizations which advocate overthrow of our Government by force or which are subject to foreign control. A California District Court of Appeal has expressed doubt as to its Constitutionality apparently on the ground that the field has been occupied by Federal legislation such as the Voorhies and McCormack Acts.<sup>15</sup>

Sixteen states have enacted legislation to suppress directly the political activity of subversive groups and individuals, addressed in general terms to parties and persons who advocate violent overthrow of the Government or other unlawful interference with its functions. The provisions excluding parties within such a category from the ballot box, from recognition as a political party, and precluding such candidates from holding or running for elective office have been held Constitutional. However, when addressed to persons as parties affiliated with the Communist Party as such, they have failed to clear the Constitutional hurdle when passed upon.<sup>16</sup> Proof of the

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<sup>14</sup>Calif. Corp. Code, Sections 35000-35302 (Deering 1948).

<sup>15</sup>*People v. Noble*, 68 Cal. App. 2d 853, 892, 158 P. 2d 225, 246 (1945).

<sup>16</sup>*Communist Party v. Peck*, 20 Cal. 2d 536, 127 P. 2d 889 (1942) and Stanford Law Review (*supra*), pages 90-91.



violent overthrow theory renders such statutes difficult to put to any effective use.

Other Federal legislation on the subject includes the Espionage Act of 1917<sup>17</sup> and the Non-Communist Affidavit provision of the Taft-Hartley Act.<sup>18</sup> The former Act provides heavy penalties for obtaining or disclosing information affecting the National defense with intent or reason to believe the information \* \* \* to be used to the injury of the United States or to the advantage of any foreign nation. The specific intent required is an element of proof. The latter Act is designed to prevent infiltration of Communists into Labor Union positions where they may vote paralyzing strikes in vital industries. This section of the Taft-Hartley Act has been sustained by three Federal Courts<sup>19</sup> and by the United States Court of Appeals for the Seventh Circuit.<sup>20</sup>

In the face of the above enactments, and in particular the Voorhies Act, which brands all registrants as subversives, the Communist Party avowedly severed its affiliation with the Communist International, and the Party Constitution now contains the following provision:

“Adherence to . . . the activities of any . . . group . . . which conspires or acts to subvert . . . or overthrow any or all institutions of American democracy whereby the majority of the American

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<sup>17</sup>40 Stat. 217 (1917) as amended, 50 U. S. C., Sections 31-42 (1946).

<sup>18</sup>61 Stat. 146, 29 U. S. C. A., Section 159(h), Supp. 1947.

<sup>19</sup> <sup>20</sup>See Footnotes 38 and 39 on page 92 of Stanford Law Review (*supra*).



people can maintain their right to determine their destinies in any degree shall be punished by immediate expulsion.” Constitution of the Communist Party of the United States of America, Art. IX, Sec. 2 (1945).

Therefore, since the Communist Party is not an illegal organization under any State or Federal Court, and membership therein is not unlawful by reason of affiliation alone, since the Smith Act and the *Foster* case in New York required proof of intent to overthrow the Government by force and violence, the District Court committed no error in holding that these appellants had no basis, in law or fact upon which to claim the privilege of silence.

### Conclusion.

Therefore, the Trial Court committed no error in ordering the witnesses to answer the questions put to them before the grand jury. There was no error in finding that the answers to the questions did not place them in any real or present danger of self-incrimination. The Court took into consideration the immunity expressly offered to each witness for his testimony. It took cognizance of the stated purpose of the grand jury investigation namely, to inquire into the loyalty of certain Government employees pursuant to an Executive Order of the President. The Court penetrated the veil of subterfuge which the appellants claimed herein and decided that the real basis for their refusal to testify was to shield other persons or conceal any knowledge they had concerning the books and

records of the Los Angeles Communist Party. In its ultimate conclusion, it decided that answers to these questions could not possibly harm the witnesses. The Trial Court in such matters was in the best possible position to assess and evaluate the danger that these witnesses claimed in view of all the circumstances. Having come to its conclusions, the Court was justified in holding the appellants in contempt. It is now that we ask this Court of Appeals to sustain these judgments for they should be affirmed.

Respectfully submitted,

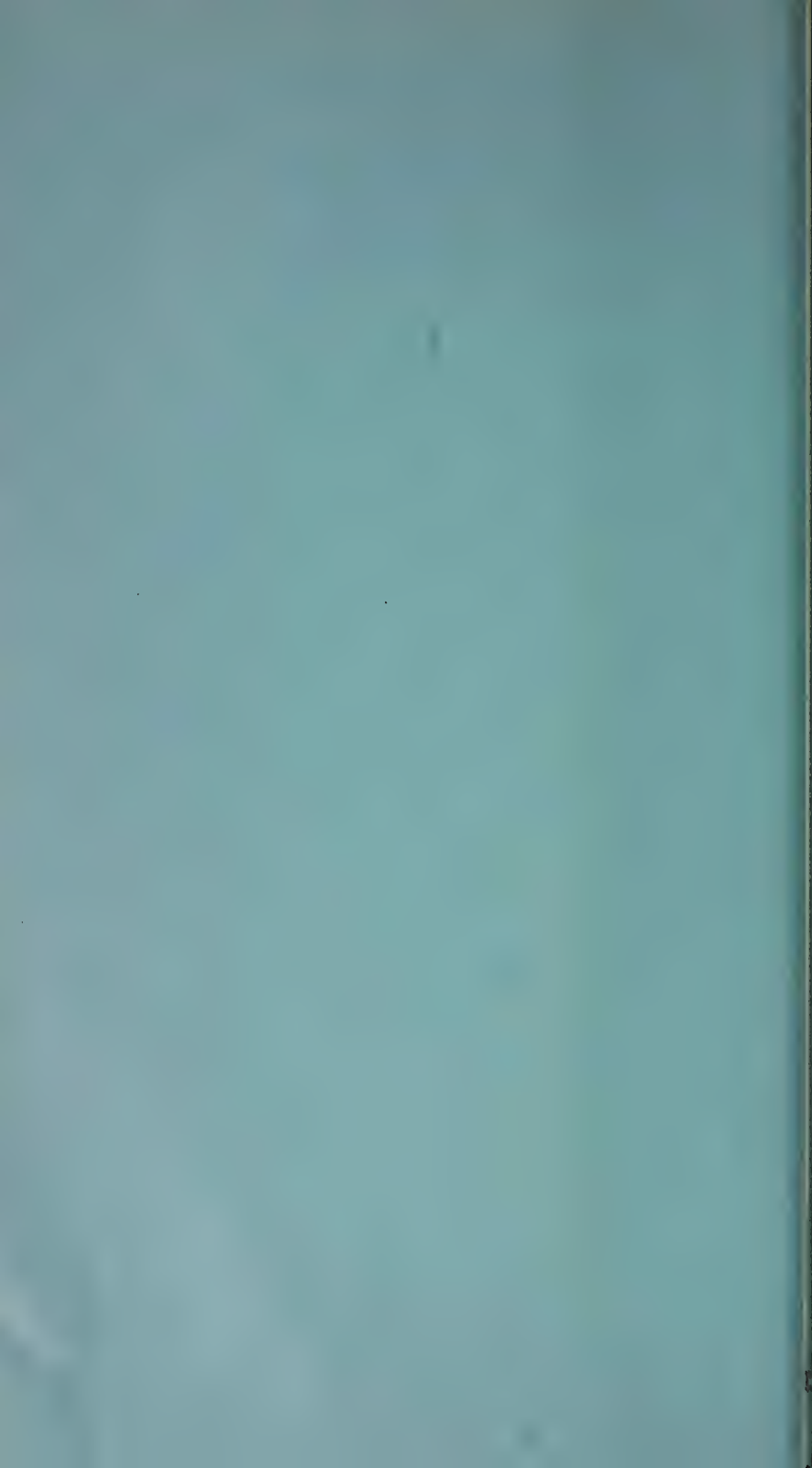
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## APPENDIX A.

### "PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital important that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

Now, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS \* \* \* \*

PART II—INVESTIGATION OF EMPLOYEES \* \* \* \*

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION  
\* \* \* \*

PART IV—SECURITY MEASURES IN INVESTIGATIONS \* \* \* \*

PART V—STANDARDS \* \* \* \*

PART VI—MISCELLANEOUS \* \* \* \*

HARRY S. TRUMAN

THE WHITE HOUSE,

March 21, 1947."

(F. R. Doc. 47-2831; Filed, Mar. 24, 1947; 9:45 a.m.)



## APPENDIX B.

Sections 2, 3, and 5 of the Act of June 28, 1940, c. 439, 54 Stat. 670, 671, commonly known as the Smith Act, provided in pertinent part as follows:

“Sec. 2( 18 U. S. C. (1946 ed.) 10). (a) It shall be unlawful for any person \* \* \* \*

(3) to organize or help to organize any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term ‘government in the United States’ means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

Sec. 3 (18 U. S. C. (1946 ed.) 11). It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title. \* \* \*

Sec. 5 (18 U. S. C. (1946 ed.) 13). (a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than ten years, or both. \* \* \*”

No. 12283

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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DOROTHY RAY HEALEY, MAX APPELMAN, ALVIN ABRAM  
AVERBUCK, ELVADOR G. GREENFIELD and HORACE  
MORTON NEWMAN, JR.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## REPLY BRIEF FOR APPELLANTS.

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FILED

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No. 12283

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*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

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---

## REPLY BRIEF FOR APPELLANTS.

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### POINT I.

Under the Circumstances of This Case Appellants  
Were Privileged Not to Answer Questions Put  
to Them Concerning the Membership Records of  
the Communist Party.

In its first point the government has fashioned a strange exception to the privilege against self-incrimination. "In their official capacity", it contends, officers of an unincorporated association "have no privilege against self-incrimination." (Appellee's Br. p. 19.) This generalization the government has distilled from certain cases dealing, first, with the principle that such officers have no privilege to

refuse to produce the records of their organization even where their contents incriminate the officers, and, second, with the extension of that rule to require such officers to identify as "genuine" the records produced. We shall show that the government has misapplied the authorities which it invokes and has fatally misconceived both the facts in the case and the nature of appellants' claim of privilege.

In this aspect of the case the government urges that the judgment below as to Healey must be affirmed for her failure to answer questions numbered (2), (10), (11), (12), (28), (30), and (31), as to Averbuck on questions numbered (3), and (9), as to Greenfield on questions (1) and (3), and as to Newman on question (11), (13), and (16). Central to the government's position is that these appellants were in fact officers of the Los Angeles Communist Party. There was evidence to the effect that Dorothy Healey was at a time prior to the proceedings below the organizational secretary of the Los Angeles Communist Party (see Appellants' Op. Br. pp. 9-10). There is no evidence of any kind in this record that appellants Averbuck, Greenfield and Newman held any office whatever in the Los Angeles Communist Party or any other subdivision of the Communist Party. The government's entire argument, therefore, utterly collapses as to Averbuck, Greenfield and Newman. Concerning Healey the government's evidence has never been admitted to be true by appellants, and when Healey was asked whether she was in fact the organizational secretary of the Los Angeles Communist Party she claimed her privilege [R. 65, 306]. There remains to be examined only whether Healey was privileged not to answer the questions specified above.

The government first relies upon a series of cases<sup>1</sup> holding that the officer of a corporation or unincorporated association is not privileged to refuse to *produce* records of the organization for the reason that the contents of the records might incriminate him. In each of these cases the question arose simply in terms of the *production* of the organization's records irrespective of the effect of the contents of them. These cases do not deal with the application of the privilege to *testimony* of the officer.<sup>2</sup>

This line of cases has no bearing upon the facts at bar. There is in this case no issue concerning a refusal to produce records. Appellant Healey was not held in contempt for refusing to produce records. And Dorothy Healey has not asserted her privilege against self-incrimination to excuse or justify a refusal to produce any records.

Healey was originally subpoenaed as an individual and merely to testify. During the course of her interrogation she was directed by the grand jury to produce certain records of the Los Angeles Communist Party [R. 68, 69, 70]. She responded that she did not then, and never did, have such records [R. 69, 70]; that she did not then, and never did, have control over them [R. 70, 71]; that she was not in charge of them [R. 69, 70] and never had

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<sup>1</sup>*United States v. White*, 322 U. S. 694, 88 L. Ed. 1542; *Wilson v. United States*, 221 U. S. 361, 55 L. Ed. 771; *Dreier v. United States*, 221 U. S. 394, 55 L. Ed. 784; *Brown v. United States*, 276 U. S. 134, 72 L. Ed. 500; *Hale v. Henkel*, 201 U. S. 43, 50 L. Ed. 652; *United States v. Watson*, 266 Fed. 736.

<sup>2</sup>In *Hale v. Henkel*, *supra*, a collateral question was raised as to the right of the corporate officer to refuse to testify upon claim of privilege for the corporation. The court pointed out that the witness could claim the privilege only for himself and then disposed of the case on other grounds.

been [R. 71]; and that such records were not "made by somebody who works under [her] direction" [R. 71]. The court below considered the government's motion for an order compelling Healey to answer the grand jury's questions as also a motion for an order compelling her to produce the documents in question, and, *sua sponte*, took the latter off Calendar [R. 248].<sup>3</sup> The presentment [R. 15, 17-20] charged Healey only with refusal to answer questions, and it is upon this alone that the judgment below rests [R. 40].

The government, then, derives no support from cases dealing with the naked production of records of an organization, for this problem is not in the case at bar. The second support for the government's thesis that officers of organizations, in their official capacity, have "no privilege against self-incrimination" is derived from cases dealing with efforts to compel testimony from such officers in connection with their production of the organization's records. The cases will not bear the extravagant claims made by the government.

It is true that where the officer has produced the records of his organization he may be compelled to give testimony "auxiliary to the production." But such testimony extends only to identification of the documents, "to declare that the documents are genuine" (*United States v. Austin Bagley Corp.* (2 Cir.), 31 F. 2d 229, 234).

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<sup>3</sup>Immediately after her first appearance before the grand jury Healey was served with a subpoena *duces tecum* directing the production of books and records of the Communist Party. She made a return to the grand jury stating her inability to comply because she did not have possession, control or custody of, or access to, the records [R. 307]. The proceedings below and the judgment in contempt are in no wise predicated upon the failure to comply with the subpoena.



Such testimony is essentially a part of the act of production which is not privileged (*United States v. Lay Fish Co.* (D. C., S. D. N. Y.), 13 F. 2d 136, 137; *United States v. Illinois Alcohol Co.* (2 Cir.), 45 F. 2d 145). These cases of course have no application to the instant case because Healey had not produced records, and had not been asked to declare them "genuine."

But once the officer is called upon to go beyond identification the privilege applies notwithstanding that in his "official capacity" he is testifying concerning the affairs of the organization in which he participated ("in his official capacity") and concerning the records produced. At that point he can in the language of *Wilson v. United States*, 221 U. S. 361, 55 L. Ed. 771, "decline to utter upon the witness stand a single self-incriminating word" (221 U. S. at 385, 55 L. Ed. at 781).

This court has so ruled in connection with a union officer who produced union records upon a grand jury subpoena and then was asked whether a signature upon a contract (included in the documents produced) was his and whether he had participated in the negotiation of that contract. On these matters this court ruled the witness had his privilege (and consequently earned immunity by his testimony) because the testimony was more than mere identification and touched upon the witness' connection with the transactions for which he was later indicted. "That the contract on its face may have been lawful . . . or that the defendant signed it in an official capacity cannot be said to destroy his immunity as an individual in all circumstances." (*Lumber Products Assn. v. United States* (9 Cir.), 144 F. 2d 546, 553.)

In the words of the government the testimony in the last cited case was "concerning books and records of an



unincorporated association" (Appellee's Br. p. 26) and was given by an officer in his official capacity and about his activities in that capacity. But nevertheless the privilege was held to apply. This court has therefore rejected the government's position. So also has the Seventh Circuit, *United States v. Molasky*, 118 F. 2d 128.

In *United States v. Daisart Sportswear, Inc.* (2 Cir.), 168 F. 2d 856<sup>4</sup> the court rejected the idea that a corporation officer testifying concerning his activities as such has no privilege. There the officer appeared pursuant to a subpoena *duces tecum*, reported that the corporate records were unavailable and then testified concerning the corporation's activities. In upholding his claim of immunity in part<sup>5</sup> the court observed:

"The Government maintains that, since the questions asked went to what the corporation did, rather than to what Smith had done, he relinquished no privilege in testifying, and hence was not entitled to immunity. It is clear, however, that his answers, at least in part, incriminated him, and to that extent he must be granted immunity. It is true a corporate officer may be compelled to produce corporate records even though they tend to incriminate him, *Wilson v. United States*, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D 558, and may even be compelled to testify as to the genuineness of corporate documents, *United States v. Austin-Bagley Corporation*, 2 Cir., 31 F. 2d 229, certiorari denied *Austin-Bagley Corporation v. United States*,

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<sup>4</sup>Reversed in part on other grounds *sub nom.*, *Smith v. United States*, 337 U. S. 137, 93 L. Ed. 1264.

<sup>5</sup>The Supreme Court upheld it *in toto*, *Smith v. United States*, *supra*.

279 U. S. 863, 49 S. Ct. 479, 73 L. Ed. 1002. Yet we do not believe that the principle of the Austin-Bagley case, *supra*, may be projected so that a corporate officer may be compelled to testify as to any and all phases of the corporation's activities, without at the same time obtaining a grant of immunity for the incriminating matter he is compelled to disclose." (169 F. 2d at 861-862.)

The government's contention that corporate officers who testify concerning the corporation's records enjoy no immunity was given searching examination in *United States v. Goldman* (D. C. Conn.), 28 F. 2d 424. There officers of a corporation appeared and produced corporation records before a grand jury and testified concerning those records. After indictment they asserted immunity by plea in bar. This the government resisted on the ground that they testified as corporate officers concerning corporate records and therefore had no privilege. In rejecting this position the court fully answered the government in the case at bar:

"It is true, as the government asserts, that these men testified only as corporate officers and not as individuals. It is difficult to measure the *quantum* of significance in this assertion . . . The rule which regards a corporation as a juristic person does not fuse the officer into the corporation. Nor is it legally permissible to extract incriminatory testimony from an individual upon the claim that his evidence is not being produced by himself, but by a cog of the corporate mechanism. (P. 433.)

\* \* \* \* \*

"That they testified as corporate officers begs the question, and who can say but what their testimony

enabled the government 'to ferret out the facts' necessary to complete its case against these defendants. That being so, the court should not deny them the immunity guaranteed by the provisions of the act." (P. 434.)

A similar result has recently been reached by the California District Court of Appeal (Third Appellate District) in the case of *McLain v. Superior Court*.<sup>6</sup> McLain had been subpoenaed as chairman of the Citizens Committee for Old Age Pension, a corporation, to produce designated records (including cancelled checks) before a legislative committee and to testify. He produced the records, was sworn and testified. The committee told him that he was subpoenaed only in his capacity as chairman of the corporation. Since the committee was investigating alleged bribery of an assemblyman, McLain testified that he had segregated the cancelled checks payable to the assemblyman and then handed them to the committee. It was held that McLain could and did testify only as an individual and that his segregating, identifying and handing the checks to the committee constituted testimony, which the court summarized as follows:

"Here are four checks; they are cancelled checks of the Citizens Committee for Old Age Pension; they were drawn and made payable to Assemblyman John W. Evans; they cleared through the Committee's bank account; they are for \$75.00 each; they are dated

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<sup>6</sup>Decided August 21, 1950. The opinion is not yet reported. The citation will be furnished as soon as available. If there is no official report of the decision by the time of oral argument herein, copies will be furnished the court at that time.

January 27th, February 25th, April 8th and April 15, 1949; my name appears as drawer for the Committee; I was then the Committee's Chairman of the Board of Trustees."

Having been indicted for the transactions so revealed, McLain was held to have incriminated himself and thus was entitled to statutory immunity.

It would be difficult to find a case wherein the line between production and identification on the one hand and testimony concerning the individual officer's activities subject to the privilege on the other, is more tenuous. But, since the identification of the cancelled checks was in fact testimony concerning not only the records of the corporation but also the participation of McLain in the transactions, the privilege was held to apply:

"Here the subpoena was directed to the corporation and to petitioner as chairman of the board of trustees thereof and it required the production of the books and records referred to. However, when petitioner was sworn he became a witness pursuant to the *ad testificandum* part of the process served upon him. Indeed, there is no way in which a witness can be sworn otherwise, although, as has appeared from the statement of facts, there was a prompt declaration by counsel for the committee that petitioner had been subpoenaed merely in his capacity as chairman of the board of trustees of the corporation and not otherwise. That position was departed from when to him there was administered the usual oath administered to all witnesses. The situation may be illustrated by inquiring how a sentence for contempt would have been served had the petitioner after the administration of the oath proved contumacious. Clearly, he would have served that sentence individu-



ally and not as chairman of the board of trustees. If, therefore, after the production of the books and papers in response to the subpoena *duces tecum*, by which production the demands of that process had been met, the petitioner, in response to appropriate questions, gave testimony touching the facts and acts for which he now stands under indictment, no reason appears why he should not have the immunity granted him by the statute in exchange for his constitutional privilege against self-incrimination."

It is therefore accurate to say that whenever the testimony of the officer touches upon his individual activities and knowledge, even as a corporation officer he has the benefit of the privilege. The cases, then, destroy the government's contrived thesis. Officers of organizations have no privilege to refuse to produce and identify records of their organization. But beyond that, they have their privilege as any other individual, and this privilege applies when they testify "in their official capacity," and "concerning books and records" of their organizations, and concerning their activities "in their official capacity." The only test is whether their testimony connects them individually with incriminating transactions.

But in any event, the government's argument wholly misapprehends the basis and nature of Healey's claim of privilege. She has not claimed her privilege by way of refusing to produce records of the Communist Party, for she was not ordered to produce any. She has not claimed her privilege not to answer questions seeking authentication or identification of such records since none were



produced. Thus the cases dealing with the application of the privilege to the production of records of an organization and to testimony "auxiliary to the production" cited by the government do not reach the problem here.

Dorothy Healey fears incrimination under the Smith Act (18 U. S. C. 2385, 371) growing out of association with the Communist Party. The facts upon which the reasonableness of this fear is predicated are summarized in our opening brief. (See especially pp. 13-19.) In short, the national leaders of the Communist Party had been indicted and were on trial (and have since been convicted) of conspiring "to organize as the Communist Party of the United States of America, a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence . . ." [II R. 327]; the same leaders were indicted for membership in the Communist Party knowing its purposes as just stated [II R. 331]. At the time these indictments were announced, the Los Angeles press carried stories to the effect that "local Federal attorneys indicated that the indictments may be the forerunner of a possible nationwide roundup of all American Communist Party members, or persons known to be associated in Communist activities" [Ex. D. Idf., II R. 335-336]. Other news stories told of Department of Justice plans to convene grand juries in named "key cities," including specifically Los Angeles, to obtain indictments against "well known Communists" [Ex. E. Idf., II R. 337, Ex. I. Idf. II R. 305-306]. At the opening of the grand jury investigation before which Healey was summoned, the government attorneys made statements to the press to the effect that the inquiry was "only the opening gun" of the govern-

ment's campaign against the Communists and that prosecutions would follow "if sufficient evidence is uncovered" [II R. 302, 304]. It thus appears from the "setting" adduced that any testimony indicating a witness' close association with the Communist Party in Los Angeles would create a substantial peril of prosecution under the Smith Act based upon membership in, or affiliation with, or aiding, or abetting, or helping to organize, an organization deemed by the government to advocate overthrow of government by force and violence. This is the more especially true since the announced plans of the Department of Justice and the statements of the prosecutors handling the inquiry indicated that such indictments might well eventuate from the very grand jury before which Healey was interrogated.

It is plain that answers to the questions here involved might give evidence of such an incriminatory association or at least give leads to such evidence. One would not know "who has the books and records of the Los Angeles County Communist Party" (question (2)); "whether or not the financial director would have a record of the dues paid by the members" (question (10)); whether "the membership or social director of each division have (*sic*) a list of the membership of that division" (question (28)); whether the membership director and the financial director have the books and records of the Los Angeles County Communist Party (question (30))—one would not know these things so as to be able to give competent and admissible testimony about them unless he had a close organizational relationship with the Communist Party. To admit to having such knowledge would provide a strong evidentiary link in the proof of association with the Communist Party culpable under the Smith Act.

Dorothy Healey, then, was called upon to give answers which might incriminate her as an individual. These answers would have come *not* from records or the identification of records, but from her own lips and concerning her own individual association with an organization which the government has denounced as a conspiracy in violation of the Smith Act. True, such testimony would have been, in the government's words, "concerning books and records of an unincorporated association" (Appellee's Br. p. 26), and it might have assisted the government in locating these records. But that testimony would have been mainly about Dorothy Healey and her connection with the Communist Party. It might have incriminated her in the same way that Ryan's testimony "concerning" the union contract and his connection therewith incriminated him in *Lumber Products Assn. v. United States*, *supra*, or Molasky's testimony "concerning" the corporation's records of financial transactions and his "knowledge" about them incriminated him in *United States v. Molasky*, *supra*, or the testimony of Pike and Comen "concerning" the corporate records incriminated them in *United States v. Goldman*, *supra*. That the testimony was or would have been "concerning" the organization's records is not the test. The issue turns on whether such testimony went beyond production and identification of those records and touched upon matters from the witness' own mouth which could reasonably incriminate him. In the case at bar the testimony sought from Healey was not asked in connection with her production or identification of records; it went solely to her knowledge of the internal workings of the Communist Party and might have been incriminating under the Smith Act.

## POINT II.

**Appellants Could Not by Operation of Law or the Honeyed Words of the Prosecution Have Obtained an Immunity Sufficient to Supplant Their Privilege.**

**A. Appellants Would Not Have Had Immunity by Operation of Law Simply as a Result of Answering the Questions Upon the Lower Court's Order to Do so.**

The government contends that by answering the questions at issue upon the District Court's order, appellants would in effect have given coerced testimony which could never be used against them in any criminal proceedings, under the rationale of the forced confession cases (*McNabb v. United States*, 318 U. S. 332, 87 L. Ed. 819). *Ergo*, proceeds the government's disingenuous argumentation, appellants needed only to answer to obtain immunity.

It has long since been settled that protection against use of testimony in subsequent criminal proceedings is not immunity which is sufficient to supplant the privilege. The only immunity which is sufficient is one which prevents prosecution or the imposition of penalty or forfeiture with respect to any matter, transaction or thing concerning which the witness has testified (*Counselman v. Hitchcock*, 142 U. S. 547, 585-586; 35 L. Ed. 1110, 1122; *Brown v. Walker*, 161 U. S. 591, 594; 40 L. Ed. 819, 820; *Smith v. United States*, 337 U. S. 137, 146-147, 93 L. Ed. 1264, 1271-1272).

It is doubtful enough that had appellants answered they would have given testimony which could not have



been used against them. In all probability they would have simply waived their privilege. One who claims his privilege must make "a last ditch stand . . . He must refuse to answer or produce and test the matter in contempt proceedings or by habeas corpus" (Judge Fee in *United States v. Johnson*, 76 Fed. Supp. 538, 540-541). At all events, appellants would not have gained the immunity which the cases require as a precondition to foregoing their privilege.

**B. Appellants Were Tendered No Valid or Effective Offer of Immunity by the United States Attorney and the Special Assistant to the Attorney General.**

The government contends that the above named officials offered appellants immunity "in the broadest and most complete way possible" (Appellee's Br. p. 46). But they had no authority or power to make such an offer and it was a complete nullity. Immunity can be created only by statute (*Mulloney v. United States* (1 Cir.), 79 F. 2d 566, 578; *United States v. Kaplan* (2 Cir.), 7 F. 2d 594; *United States v. Pleva* (2 Cir.), 66 F. 2d 529; *Mattes v. United States* (3 Cir.), 79 F. 2d 127; *United States v. Johnson*, 76 Fed. Supp. 538).

The prosecutors in the case at bar did not purport to act under a statute and the government in its brief points to none. There is no such statute applicable here. No immunity was offered or conferred.

At best the prosecutor can promise not to convict in return for the testimony of an accomplice. But this con-



fers merely an equitable right to an executive pardon, enforceable only morally. A prosecutor's promise or tender of more is without authority, and void. (*The Whisky Cases*, 99 U. S. 594; 25 L. Ed. 399; *United States v. Levy* (3 Cir.), 153 F. 2d 995.) This equitable right, morally enforceable, does not dispense with the privilege:

“ . . . but we do not find any authority, and none is cited to us, in which such an equitable right to executive pardon, if the witness states fully and fairly the truth, has ever been held to do away with the constitutional privilege not to give evidence against himself, if he chooses to claim it. See *Whisky Cases*, 99 U. S. 594. It is a mere quity after all, not dependent upon a positive statute, and commensurate only with the full and fair revelation by the witness of the entire truth. If such an equitable exemption from further prosecution affects the constitutional privilege secured by the fifth amendment, then it is difficult to see why the same argument might not have been made in the *Counselman Case*.” (*Ex Parte Irvine* (C. C. Ohio), 74 Fed. 954, 964.)

### POINT III.

#### Appellants Faced a Real and Immediate Risk of Prosecution From Answers Which Might Connect Them With the Communist Party.

The totality of the setting which made connection with the Communist Party perilous for appellants is set out at pages 7-20 of Appellants' Opening Brief. One would think that the reality and immediacy of the risk of prosecution to appellants under such facts had been finally determined by this court's decisions in *Alexander, et al. v. United States*, 181 F. 2d 480, and *Kasinowitz, et al. v. United States*, 181 F. 2d 632, for the "setting" here was essentially the same as in the cited cases—differing only in showing the immediacy of the peril to these appellants. (See Appellants' Opening Brief, pp. 9-12, 14.) Since those decisions the Fifth Circuit has reached a similar conclusion in the case of *Estes v. Potter, et al.* (decided August 5, 1950).<sup>7</sup>

#### Conclusion.

The government has given this court no reason why its decisions in the *Alexander* and *Kasinowitz* cases should not be followed here. Upon the law there established the judgments below should be reversed.

Respectfully submitted,

MARGOLIS & McTERNAN,

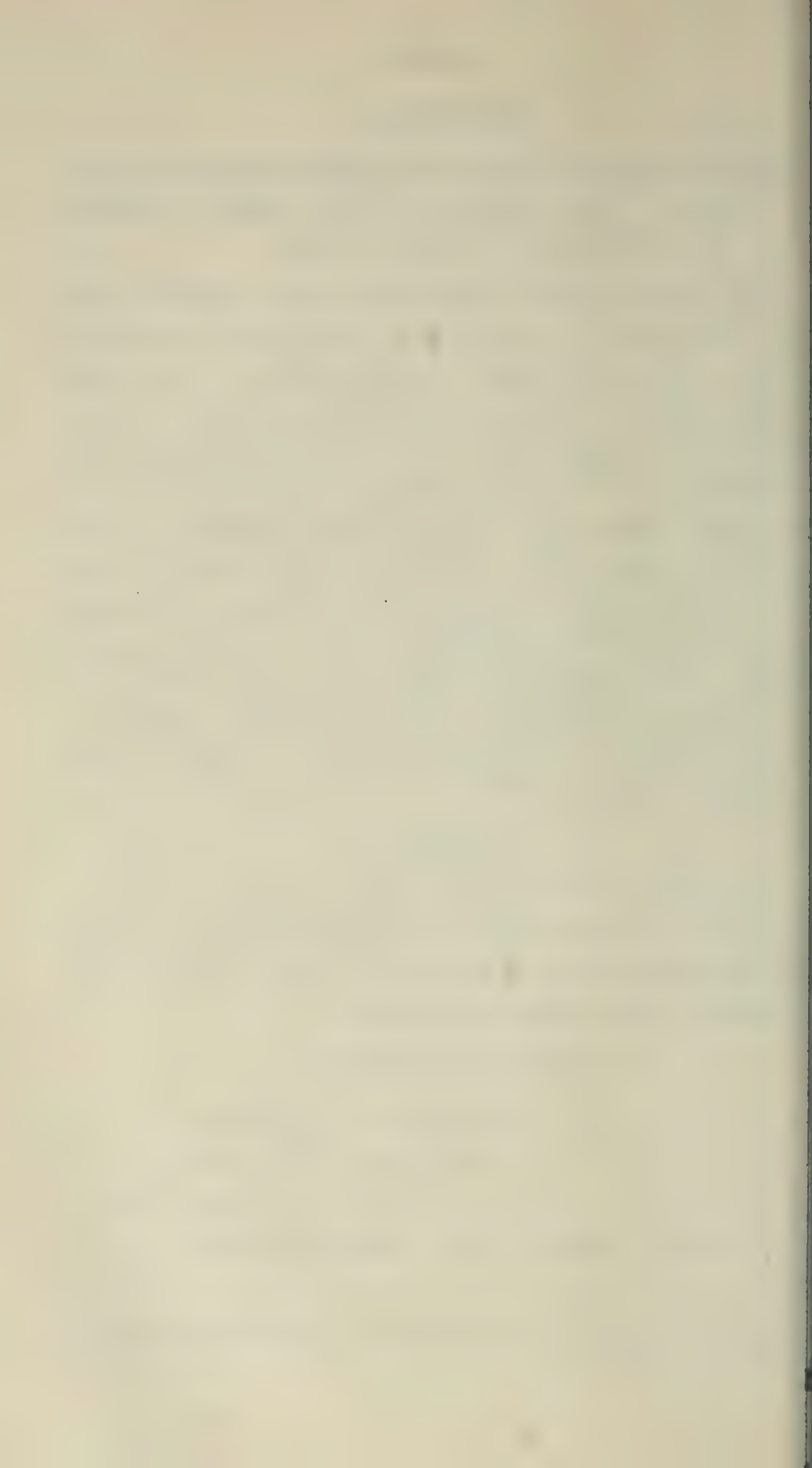
By JOHN T. McTERNAN,

*Attorneys for Appellants.*

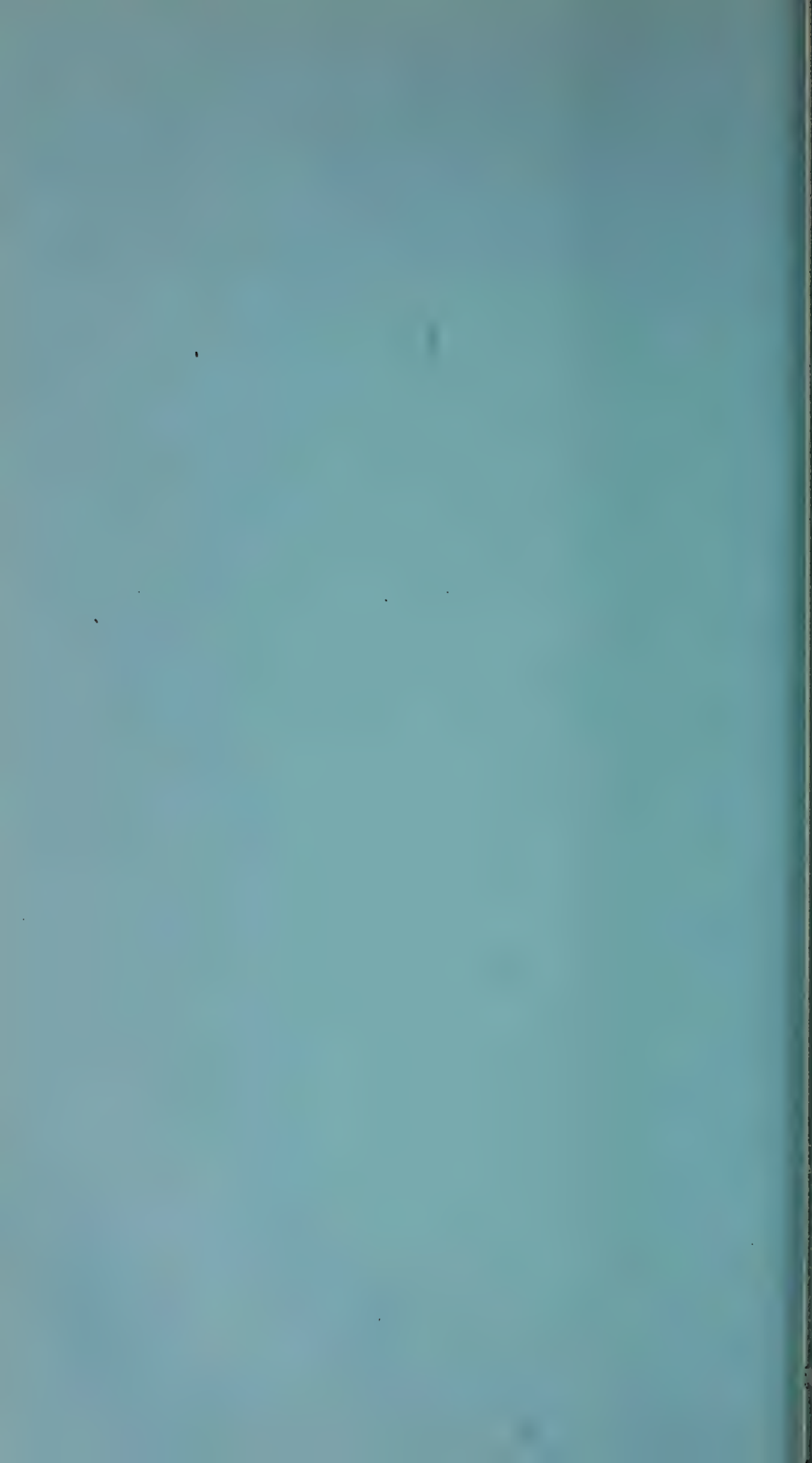
Dated Los Angeles, Calif., August 31, 1950.

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<sup>7</sup>Since the decision is as yet unreported, a copy is attached in the Appendix to this brief.









## Opinion of the United States Court of Appeals.

In the United States Court of Appeals for the Fifth Circuit. No. 13,069, No. 13,112.

Fred Estes, Appellant, vs. Frank B. Potter, as United States Attorney, *et al.*, Appellees.

Appeals from the United States District Court for the Northern District of Texas.

(August 5, 1950.)

Before Holmes, Waller, and Borah, Circuit Judges.

HOLMES, Circuit Judge: This appeal is from a judgment that adjudicated the appellant to be in contempt of court, and sentenced him to imprisonment for thirty days and to pay a fine of one hundred dollars. The proceeding is one of civil contempt, which is not punishable by both fine and imprisonment for the same offense; but that does not preclude the court from imposing a fine as a punitive measure and imprisonment as a remedial measure, or vice versa. Sec. 401 of the New Criminal Code, 18 U. S. C. A. 401; *Penfield Co., etc. v. Security & Exchange Com.*, 330 U. S. 585, 91 L. Ed. 1117, 1124.

This case arises out of a statute that authorizes immigration inspectors to conduct examinations with reference to the right of aliens to be and reside in the United States. That statute was being invoked here; and the court below, upon application duly made, ordered appellant to answer certain questions, which he declined to do on the ground that his answers might tend to incriminate him. The questions sought to be elicited from appellant, if he knew, were whether certain aliens were Communists or had been active in the Communist party. These were pertinent and material questions, because

the appellee contends here that membership in such party, or communistic activity, aims toward the overthrow of the United States Government by force and violence, and such activity on the part of any alien is ground for exclusion or deportation.

The court below deemed frivolous the appellant's claim of immunity from giving testimony against himself. It said: "If one were asked whether he knew the general reputation of a horse thief, he could not say, 'I wont tell that, because it might incriminate me. I might, myself, be a horse thief.' There is no real logic in that position." Addressing the defendant, the court said: "If and when this court's judgment with reference to answering these questions is upheld, then that will continue to be the order, and you are liable to spend a long time in jail, when you ought to be a free man, and all in the world you have to do to be a free man is simply to answer, 'Do you know these aliens? Are they Communists? Do you know this man here? Is he a horse thief?'" Do you see the point? Do you know this man here? Is he a preacher? Is he a lawyer? You can see how simple it is. There is nothing in that. So I find you in contempt, and sentence you to pay a fine of \$100 and to remain in jail for thirty days, unless you purge yourself. The Marshal will take charge of him and he will stand committed until that fine is paid and the sentence served."

We cannot agree that the matter is so simple. The answers to these questions in themselves may not have even tended toward the incrimination of appellant, but they may have been links in a chain of circumstantial evidence strong enough to convict him of a number of crimes; or such answers might well provide the means

whereby such evidence could be discovered. Appellant's claim of privilege rests upon a reasonable fear of prosecution under 18 U. S. C. 2385, and the general prohibition against conspiracy to commit an offense against the United States, 18 U. S. C. 371. The offenses defined in the foregoing statutes include at least the following:

- (1) Knowingly or wilfully advocating the overthrow of the government by force or violence;
- (2) Knowingly or wilfully abetting such advocacy or such overthrow;
- (3) Organizing a society, etc., which teaches, advocates, or encourages the overthrow of government by force or violence;
- (4) Helping or attempting to organize such a society;
- (5) Becoming a member of any such society knowing its purposes;
- (6) Affiliating with any such society knowing its purpose; and
- (7) Conspiracy to do any of the foregoing.

If the answers to the questions might tend to show that the appellant was a member of or affiliated with the Communist party, his fear of criminal prosecution was justified. There is no statute that makes it a crime to be a member of the Communist party, but the very object of the investigation to which the appellant was subpoenaed was to ascertain whether the aliens in question were members of or affiliated with the Communist party and, therefore, subject to deportation under 8 U. S. C. 137, subdivisions (e) and (g) of which provide for the deportation of any aliens who are members of or affiliated with any organization, association, society,

or group, that believes in, advises, advocates, or teaches, the overthrow by force or violence of the government of the United States. We assume the appellee's position to be that membership in the Communist party by an alien comes within the ban of Sec. 2385 of the New Criminal Code, 18 U. S. C. 2385, and the deportation statute just cited. It is palpably inconsistent, in one breath, to urge that being a Communist is a ground for deportation for belonging to a group that encourages the overthrow of the government by force; and, in the next breath, to argue that it may not incriminate one to be compelled to testify that he is a Communist, knows Communists, or has attended a meeting of Communists. Yet, this seems to be the position of appellee; it would be idle merely to ask the witness if he knew the aliens and, upon his answering yes, then to stop his examination; and the law never requires the doing of an idle thing. The form of the question, "Do you know this horse-thief," would be objectionable, because it would imply that the defendant was a horse-thief.

Appellant was asked whether he personally knew the alien; if he knew whether said alien was a member of the Communist party; if he knew whether the alien contributed funds to the Communist party; if he knew whether the alien attended meetings of the Communist party, etc. He could hardly know whether the alien attended meetings without being present there in person, and evidence of appellant attending such meetings would tend to show that he was a Communist. Appellant was not asked concerning things that he might have heard or been told. He was not asked if he knew the alien's reputation for communistic activities. The distinction is a significant one. He could not know the crucial



things that he was asked about without furnishing a link in the chain of evidence that might be needed to convict him under the New Criminal Code, 18 U. S. C. 2385 or 18 U. S. C. 371. If affiliation with the Communist party is sufficient ground for deportation of an alien for the reasons urged, it is a reasonable ground for a citizen to fear a prosecution for conspiracy. If the appellant denies that he is a Communist, he may be prosecuted for perjury; if he admits it, he may be prosecuted for belonging to a group that encourages the overthrow of governments by force; if he declines to do either, he is "liable to spend a long time in jail, when [he] ought to be a free man." This is a perilous position for a citizen, who is presumed to be innocent unless the facts here are sufficient to adjudge him guilty of contempt.

The questions propounded to appellant do not disclose the incriminatory nature of the answers sought to be elicited, but appellant does not have to prove that his answers would incriminate him to be entitled to his privilege. If that were the nature of the burden, he would be forced to divulge the very facts that the immunity permits him to suppress. A witness need only show that his answers are likely to be dangerous to him. If in the circumstances it is reasonable to infer the possibility of incrimination from the answers that the witness may give, the privilege may be claimed. It is for the court to determine, in the first instance, whether incrimination is reasonably possible from any



answer the witness may give; but if such possibility exists, then the witness has the absolute right to assert his privilege, which extends to more than the admission of a crime or any element thereof. The privilege bars compulsory disclosure of any fact that tends to incriminate a witness. *Counselman v. Hitchcock*, 142 U. S. 547; *Mason v. United States*, 244 U. S. 362; *In re Willie* (*United States v. Burr*), Fed. Case No. 14,692e; *United States v. Zwillman*, 108 F. (2) 802, 803; *United States v. Weisman*, 111 F. (2) 260, 262; *United States v. Cuson*, 132 F. (2) 413, 414. It would be difficult to improve upon the strong and clear language of Marshall, C. J., in *United States v. Burr*, Case No. 14,692e, 25 Fed. Cases 38, at page 40:

“When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may incriminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily then, from this statement of things, that if the question be of such a description that an

answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received.

“ . . . Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

“What testimony may be possessed, or is attainable, against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.”

The judgment appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judge Waller took no part in the final decision of this case.

A True copy: Teste:

(Seal)

OAKLEY F. DODD,  
Clerk of the United States Court of  
Appeals for the Fifth Circuit.

By J. A. Feehan, J.,  
Deputy Clerk.

No. 12284

---

United States  
Court of Appeals

For the Ninth Circuit.

---

CECELIA J. WILSON,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a corporation,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Idaho, Eastern Division.

AUG 31 1949

PAUL P. O'BRIEN,  
CLERK





No. 12284

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United States  
Court of Appeals  
For the Ninth Circuit.

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CECELIA J. WILSON,

Appellant,

VS.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a corporation,

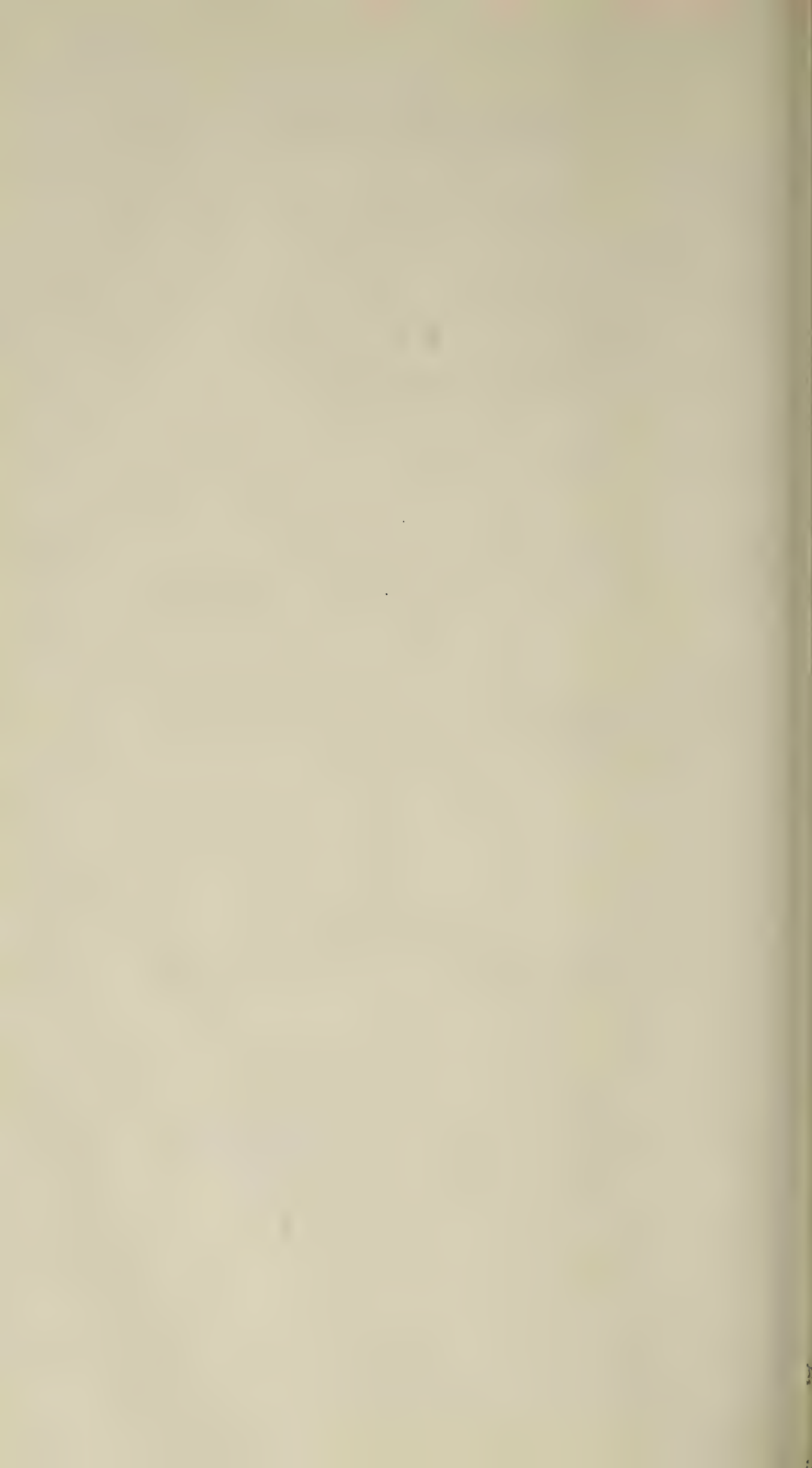
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Idaho, Eastern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Plaintiff,  
Pocatello, Idaho.

MERRILL AND MERRILL,

Attorneys for Defendant,  
Pocatello, Idaho.

In the District Court of the United States for the  
District of Idaho, Eastern Division

1462

CECELIA J. WILSON,

Plaintiff,

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a Corporation,

Defendant.

### COMPLAINT

Plaintiff complains of defendant and alleges.

#### I.

That plaintiff is a citizen and resident of the State of Idaho; that defendant is a corporation incorporated under the laws of the State of Missouri with its principal place of business at Kansas City, Missouri; that the matter in controversy exceeds exclusive of interests and costs the sum of \$3,000.00.

#### II.

That defendant on or about the 21st day of August, 1937, issued to Harry H. Wilson, now deceased, its certain policy of insurance, the policy providing indemnity in the amount of \$5000.00, for the loss of life caused by accidental means; that said policy provided for the payment of an annual premium which was paid each and every year by the deceased up until the time of his death on the 8th day of April, 1947; that the defendant is familiar with all of the terms and provisions of said policy,

and is familiar with the fact of the death of the deceased.

### III.

That there was and is due to the plaintiff, beneficiary under said policy, the sum of Five Thousand Dollars (\$5,000.00) with interest thereon at six per cent per annum from the 8th day of April, 1947, by reason of the death of the deceased, her husband, caused by accidental means, which sum the defendant has at all times refused to pay.

Wherefore, plaintiff prays that she have and recover judgment against the defendant in the sum of Five Thousand Dollars with interest thereon at six per cent per annum from the 8th day of April, 1947; for all costs of suit herein expended and plaintiff prays for general relief.

/s/ B. W. DAVIS,

Attorney for Plaintiff.

[Endorsed]: Filed July 5, 1949, U.S.C.A.

[Endorsed]: Filed Oct. 30, 1947, V.S.D.C.

---

[Title of District Court and Cause.]

### MOTION TO DISMISS, MOTION FOR A MORE DEFINITE STATEMENT AND MOTION TO STRIKE

Comes now the Business Men's Assurance Company of America, a corporation, defendant in the above-entitled action, and moves the Court as follows:

## I.

To dismiss said action upon the ground and for the reason that the complaint fails to state a claim against this defendant upon which relief can be granted against it.

## II.

Without waiving the foregoing motion, but expressly relying thereof, and in order to enable defendant to properly prepare its responsive pleading, this defendant further moves to require the plaintiff to make a more definite statement of her alleged cause of action as follows:

(a) To state whether or not she has complied with each and all of the provisions of said policy of insurance.

(b) To state the character and nature of the alleged accident, how it happened, and the provision of the insurance policy plaintiff will contend covered the same.

(c) To state whether or not proofs of death as provided in the policy have been submitted.

(d) To submit bill of particulars stating the ultimate facts concerning the alleged accident, when and where it happened and the approximate cause of said death.

## III.

Without waiving either of the foregoing motions, but expressly relying thereon the defendant moves that there be stricken from the complaint the following allegation:



“that the defendant is familiar with all of the terms and provisions of said policy and is familiar with the fact of the death of the deceased and the circumstances surrounding the same.”

upon the ground and for the reason that the same does not state a cause of action, or any part of a cause of action, and is a conclusion.

These motions are made individually and separately but consolidated pursuant to Rule 12 (g) of the Rules of Civil Procedure.

Wherefore Defendant prays said motions, and each of them, be granted and that the defendant be given the relief sought thereby.

/s/ MERRILL & MERRILL,  
Attorneys for Defendant.

Service of foregoing Motion admitted to have been made this 18th day of November, 1947.

/s/ B. W. DAVIS,  
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 20, 1947.

[Title of District Court and Cause.]

## MINUTES OF THE COURT, JAN. 13, 1948

After hearing respective counsel on defendant's Motion to Dismiss, for More Definite Statement, and Motion to Strike, the Court announced that the Motion to Strike would be granted by striking the remainder of Paragraph II, after the word “deceased,” in line 9. The other Motions will be denied,

and defendant can obtain information desired by interrogatories. Defendant given 20 days to Answer.

January 13, 1948.

---

[Title of District Court and Cause.]

### ANSWER

Defendant answers the complaint of the plaintiff as follows:

#### I.

Defendant admits the allegations contained in paragraph numbered I of said complaint.

#### II.

Answering paragraph numbered II of said complaint defendant admits that on or about the 21st day of August, 1937, it issued to Harry H. Wilson, now deceased, its certain policy of insurance, which policy provided for indemnity in the amount of \$5,000.00 for loss of life caused by accidental means, but only as defined and described in said policy, and admits that said policy provided for the payment of an annual premium, but denies each and every other statement, claim, or allegation contained in said paragraph.

#### III.

Answering paragraph numbered III of said complaint defendant admits that it has refused to pay the money claimed, but denies that said deceased died through accidental means, within the coverage,

of said policy and denies that said plaintiff has complied with all of the provisions of said policy.

IV.

Defendant denies each and every other allegation or claim in said complaint not herein specifically admitted.

Wherefore Defendant having fully answered said complaint prays that plaintiff take nothing by reason thereof and that it may recover its costs incurred herein.

/s/ A. L. MERRILL,

/s/ R. D. MERRILL,

Attorneys for Defendant.

Service acknowledged Feb. 2, 1948.

[Endorsed]: Filed Feb. 3, 1948.

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[Title of District Court and Cause.]

AMENDED ANSWER

Defendant answers the complaint of the plaintiff as follows:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

I.

Defendant admits the allegations contained in paragraph numbered I of said complaint.

## II.

Answering paragraph numbered II of said complaint defendant admits that on or about the 21st day of August, 1937, it issued to Harry H. Wilson, now deceased, its certain policy of insurance, which policy provided for indemnity in the amount of \$5,000.00 for loss of life caused by accidental means, but only as defined and described in said policy, and admits that said policy provided for the payment of an annual premium, but denies each and every other statement, claim, or allegation contained in said paragraph.

## III.

Answering paragraph numbered III of said complaint defendant admits that it has refused to pay the money claimed, but denies that said deceased died through accidental means, within the coverage of said policy and denies that said plaintiff has complied with all of the provisions of said policy.

## IV.

Defendant denies each and every other allegation or claim in said complaint not herein specifically admitted.

## Third Defense

## I.

That the insurance policy written by the defendant insured Harry H. Wilson against loss resulting directly and independently of all other causes from bodily injuries sustained during any term of the policy and effected solely through accidental means,

subject to the provisions and conditions and limitations contained therein; that said policy was written and signed in Kansas City, Missouri, and became effective at said time and place, and must be construed under the laws of said state.

## II.

That the said policy further provides that the accident insurance under said policy covers all bodily injuries, fatal or otherwise, subject to the provisions, conditions and limitations specified in said policy, except, among others, "those caused wholly or partly, or the results of which are contributed to, by bodily or mental infirmity, hernia, \* \* \* or by any disease or medical or surgical treatment therefor, such hernia, \* \* \* or medical or surgical treatment to be construed as sickness."

## III.

That shortly prior to the death of Harry H. Wilson, he was operated on for hernia and that such bodily infirmity and operation wholly or partly caused or contributed to his death in such manner as to be within the exclusions of said policy.

## IV.

That the death of Harry H. Wilson was not, or the result directly and independently of all other causes of bodily injuries, affected solely through accidental means within the meaning and terms and conditions of said policy of insurance and the defendant never became and is not now liable thereunder.



## Fourth Defense

That said policy of insurance, among other things, provides that written notice of the injury upon which claim is based must be given to the company within twenty days after the accident causing such injury and that upon receipt of said notice the company will furnish the claimant with such forms as are usually furnished by it for filing proofs of loss and that affirmative proof of loss must be furnished to the company at its office within ninety days after the claim of such injury; that the plaintiff herein advised the company of decedent's death and thereupon said company transmitted the usual forms for preparation filing and return consisting of a claimant's statement, a doctor's statement, a mortician's statement and the statement of an eye witness; that the plaintiff did not submit said forms within the ninety days provided and has never submitted the doctor's statement nor the statement of an eye witness and the said plaintiff has not conformed with the standard provisions of said policy in the giving of proof as required therein nor establishing any right to claim under said policy if any rights otherwise existed which defendant herein denies.

Wherefore Defendant having fully answered said complaint prays that plaintiff take nothing by reason thereof and that it may recover its costs incurred herein.

/s/ A. L. MERRILL,

MERRILL & MERRILL,

Attorneys for Defendant.

Service acknowledged Feb. 20, 1948.

[Endorsed]: Filed March 8, 1948.

[Title of District Court and Cause.]

## MINUTES OF THE COURT, MARCH 17, 1948

After hearing respective counsel on defendant's motion to amend amended answer, the Court granted said motion subject to plaintiff's objection.

Respective counsel at this time stipulated that the testimony given in this cause of action would also run to case No. 1462.

Whereupon, this cause came on for trial before the Court, B. W. Davis representing the plaintiff and A. L. Merrill representing the defendant. Upon permission of the Court and agreement of counsel, it was ordered that counsel for the defendants in cases 1462 and 1463 could examine and cross-examine witnesses in this cause of action.

After hearing a statement of the case, Dr. O. F. Call, Dr. W. W. Brothers, Walter M. Jones and Laura S. Gough were sworn and examined as witnesses and documentary evidence was introduced on the part of the plaintiff, and here the plaintiff rests.

Dr. Melvin Graves and Walter M. Jones were sworn and examined as witnesses and documentary evidence was introduced on the part of the defendant and here the defendant rests, and both sides close.

It was stipulated that the depositions of Dr. Joseph Beeman, Dr. F. A. Pittenger, Dr. James L. Stewart and Dr. O. F. Swindell be copied into the record.

The Court ordered that argument be submitted on briefs, the plaintiff being granted 20 days for open-

ing brief, defendant 20 days thereafter to reply, and plaintiff 15 days to reply to reply brief. The time for filing briefs to commence the date of filing of the transcript of testimony.

March 17, 1948.

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[Title of District Court and Cause.]

### OPINION

Ben W. Davis, Pocatello, Idaho, Attorney for the Plaintiff.

Messrs. Merrill & Merrill, Pocatello, Idaho, Attorneys for the Defendant.

Clark, District Judge.

The facts were fully set forth in the case of *Wilson v. New York Life Insurance Company* recently decided by this Court. The Court adopts that opinion in so far as it is applicable here, however, there are two additional questions in this case:

First, as to whether the Idaho law is controlling or the law of the State of Missouri.

The Court is of the opinion that the insurance policy is to be interpreted in accordance with the rules of law in this jurisdiction.

The second question is concerning the limitation clause in the policy. This is the limitation clause which excepts the defendant from liability from "injuries, fatal or otherwise \* \* \* caused wholly or partly, or the results of which are contributed to \* \* \* by \* \* \* hernia, \* \* \* or medical \* \* \* treatment therefor." The policy states plainly hernia or

medical treatment therefor is to be construed as sickness.

The insured was operated on for hernia; the medical treatment was administered to aid recovery; the medical treatment caused his death; his death was unforeseen and unexpected.

Regardless of how foolish it is to say that such an accident is sickness, that is the wording of the policy. In this case the Court feels it necessary to follow the wording of the policy, that hernia and medical treatment therefor is to be construed as sickness, and that the plaintiff is not entitled to recover.

Counsel for the defendant will prepare the findings of fact, conclusions of law and judgment. These findings will be prepared to conform with the opinion of this Court filed in the case of *Wilson v. New York Life Insurance Company* except that there will be a finding here as to the Idaho Law controlling, and a finding of the Court as to the limitation clause of the policy regarding "hernia or medical treatment therefor" which will be in conformity with this memorandum.

Copy of the findings, conclusions and judgment will be served on counsel for the plaintiff and the original submitted to the Court for approval.

[Endorsed]: Filed March 24, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT, MAY 20, 1949

This cause came on regularly this date in open court for hearing on Findings of Fact and Conclusions of Law, B. W. Davis representing the plaintiff and A. L. Merrill the defendant.

The Court ordered counsel for plaintiff to amend his Proposed Findings of Fact and Conclusions of Law, and stated that judgment would be entered in compliance therewith.

May 20, 1949.

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[Title of District Court and Cause.]

No. 1462

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above-entitled cause having heretofore been submitted to the court without a jury, by agreement of counsel for the respective parties, upon issues framed by plaintiff's complaint and the answer of the defendant, as amended, and evidence having been submitted on behalf of plaintiff and defendant and written briefs having been prepared and filed by the respective parties and the Court having carefully considered said briefs and the evidence in said cause and having heretofore, on the 24th day of March, 1949, filed its written opinion, the Court now makes the following:



## Findings of Fact

## I.

That plaintiff at all times from and after the filing of her complaint up to and including the time that said matter was fully submitted to the Court, was a resident of the State of Idaho and during said time, the defendant was a Missouri Corporation, and that the sum in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

## II.

That defendant, on or about the 24th day of August, 1937, issued to Harry H. Wilson, then living and now deceased, its certain policy of insurance, the said policy providing indemnity in the amount of \$5,000.00 for the loss of life caused by accidental means; that said policy provided for the payment of an annual premium, which was paid by the insured each and every year until the time of his death on the 8th day of April, 1947, and that the premium payments due upon said policy had been paid in full at the time of the death of the Insured and that said policy had not lapsed.

## III.

That Harry H. Wilson died of accident or by accidental death on the 8th day of April, 1947.

## IV.

That prior to the accidental death of Harry H. Wilson, who was past 61 years of age, he was in the ordinary good health of the average man at that age.

## V.

That he was operated on for hernia on the 7th day of April, 1947, and that prior thereto he was given a careful examination by a skilled physician and surgeon who was a man of broad experience in his profession and who was a competent and experienced surgeon; that there was no indication that the patient at that time was not in good physical condition and the proper subject of a simple hernia operation.

## VI.

That the patient appeared normal in every respect following said operation; did not suffer any shock and did not die as a result of said hernia operation.

## VII.

That the death of Harry H. Wilson was caused by choking or coughing or violent snoring or by choking, coughing and violent snoring which caused and resulted in an embolism causing the death of the insured.

## VIII.

That the insured was given sedatives and opiates which caused the violent coughing, choking and snoring and which unexpectedly and accidentally caused the death of said insured.

## IX.

That the coughing, choking and snoring of the patient was extremely violent, extraordinary and not to have been foreseen and entirely beyond the experience of his attending physician in previous and similar conditions.

## X.

That the administration of opiates and sedatives was a reasonable and ordinary procedure to be followed by the attending physician; that the result thereof, causing the violent choking, snoring and coughing were tragical and out of proportion to the trivial cause and was an accident and resulted in death by accident.

## XI.

That the opiates and sedatives administered to the insured prior to his death were externally administered.

## XII.

That following the operation for hernia the opiates and sedatives were administered as medical treatment.

## XIII.

That the said insurance policy, among other provisions, contained the following:

The accident insurance under this policy covers all bodily injuries, fatal or otherwise, subject to the provisions, conditions, and limitations specified in this policy, except:

Those caused wholly or partly, or the results of which are contributed to by bodily or mental infirmity, hernia \* \* \* or any \* \* \* medical or surgical treatment therefor. Such hernia \* \* \* medical or surgical treatment to be construed as sickness.

## XIV.

That immediately after the death of the insured and within twenty days thereafter, written notice

of the death of the insured was given to the defendant; that thereafter, the plaintiff, who was very ill, and in no physical condition to attend to normal business affairs, furnished such proofs of loss to the defendant as were submitted to her; that in the giving of the notice of the death of the insured and the submission of proofs of loss, the plaintiff, the beneficiary, substantially complied with the terms of said insurance policy and that no prejudice resulted to the defendant in any way by reason of the manner of the giving of notice to the defendant and of the filing of proof of loss.

#### XV.

That the insured made application for the said insurance policy issued by the defendant in the State of Idaho and was examined by a physician in the State of Idaho and that said policy was delivered to him in the State of Idaho.

#### Conclusions of Law

##### I.

That the death of the insured, Harry H. Wilson, was accidental.

##### II.

That the plaintiff, the beneficiary, substantially complied with the provisions of the insurance policy issued by the defendant as to giving notice and furnishing proofs of loss.

##### III.

That the law of the State of Idaho is controlling in this cause and that the insurance policy, the facts

and the law applicable thereto, are to be interpreted in accordance with the rules of law in the State of Idaho.

## IV.

That by reason of the provisions of the limitation clause in said insurance policy, providing generally as follows:

The accident insurance under this policy covers all bodily injuries, fatal or otherwise, subject to the provisions, conditions, and limitations specified in this policy, except:

\* \* \*

Those caused wholly or partly, or the results of which are contributed to by bodily or mental infirmity, hernia \* \* \* or any \* \* \* medical or surgical treatment therefor. Such hernia \* \* \* medical or surgical treatment to be construed as sickness, the plaintiff is not entitled to recover from the defendant in this cause.

## V.

In this cause the court feels it necessary to follow the wording of the policy—that medical treatment after a hernia operation is to be construed as sickness, solely because it is so stated in the policy and for that reason plaintiff is not entitled to recover.

Dated this 31st day of May, 1949.

/s/ CHASE A. CLARK,

U. S. District Judge.

[Endorsed]: Filed May 31, 1949.



[Title of District Court and Cause.]

MINUTES OF THE COURT, MAY 31, 1949

After hearing respective counsel, the Court ordered that the record show that Findings of Fact and Conclusions of Law were prepared under the directions of the Court and neither counsel is responsible for the preparation of same.

Thereupon, the Court signed the Findings of Fact and Conclusions of Law, and Judgment, and ordered the same filed herein.

May 31, 1949.

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[Title of District Court and Cause.]

No. 1462

JUDGMENT

This cause came regularly on for trial before the Court sitting without a jury, upon the issues framed by the Complaint of the plaintiff and the Amended Answer of the defendant thereto. A trial by jury was expressly waived. Evidence was introduced and said matter was argued, briefed, and submitted to the Court for decision. The Court having rendered its decision and made and entered its Findings of Fact and Conclusions of Law now renders its judgment in accordance therewith:

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that the plaintiff take nothing by reason of her complaint and that the action be, and it is hereby, dismissed on the merits, and that defendant have and recover from the plaintiff its costs

in this action and defendant have execution therefor.

Dated this 31st day of May, 1949.

/s/ CHASE A. CLARK,  
U. S. District Judge.

[Endorsed]: Filed May 31, 1949.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS

Notice is hereby given that Cecelia J. Wilson, plaintiff above named, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit from the final judgment entered in this action on the 31st day of May, 1949.

/s/ B. W. DAVIS,  
Attorney for Cecelia J.  
Wilson.

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[Title of District Court and Cause.]

CIVIL ACTION No. 1462  
BOND ON APPEAL

Know All Men by These Presents, that Great American Indemnity Company, New York, a corporation as Surety, and Cecelia J. Wilson as Principal, are held and firmly bound unto Businessmen's Assurance Company of America, a corporation, in the sum of Two Hundred Fifty & 00/100 (\$250.00) to which we bind ourselves, our successors and assigns, jointly and severally.

Sealed With Our Hands, and dated this 23rd day of June, 1949.

Whereas, on the 31st day of May, 1949, in the above-entitled action, In the District Court of the United States for the District of Idaho, Eastern Division, between Cecelia J. Wilson, plaintiff above named, and said Business Men's Assurance Company of America, a corporation, defendant above named, a judgment was rendered against said plaintiff and said plaintiff has duly filed a notice of appeal from said judgment;

Now, the Condition of This Bond is that if said Appeal is dismissed or the judgment affirmed, all costs incurred by the defendant or such costs as the Appellant Court may award in the event such judgment is affirmed; that the payment of said costs is hereby secured, otherwise, this obligation is to be void.

The undersigned agree that this is a bond on appeal from the Federal District Court to the Circuit Court of Appeals given under the obligation of Paragraph (c) of Rule 73 of the Federal Rules of Civil Procedure.

CECELIA J. WILSON.

By /s/ B. W. DAVIS,

Her Attorney.

GREAT AMERICAN INDEMNITY COMPANY,  
NEW YORK.

[Seal] By /s/ CHAS. KIRCHNER,

Its Attorney-in-Fact.

[Endorsed]: Filed June 24, 1949.

[Title of District Court and Cause.]

## STATEMENT OF POINTS

Appellant states that the points upon which she intends to rely on appeal in the above-entitled action are as follows; and she deems the entire record on appeal as necessary for consideration of the points to be relied upon, to wit:

### I.

That the court erred in his conclusion of law that the plaintiff was not entitled to recover, for the reason that the plaintiff, having proven and the court having found that the death of the deceased was caused by accident and that the cause of the accident was violent choking, snoring and coughing, brought on by the administration of opiates and sedatives, the Court could not and should not, as a matter of law, regardless of the terms of the Insurance Policy, conclude that the cause of death was sickness.

### II.

That the word "sickness" has a well-defined meaning; that it is a diseased condition, illness or nausea and that the defendant, the Business Men's Assurance Company of America, could not and should not be allowed to give to the word "sickness," unusual or unaccustomed meaning, or to provide in a policy to the detriment of the policyholder that medical or surgical treatment should be construed as sickness.

### III.

That the cause having been determined and gov-

erned by the Rules of Law of the State of Idaho, it was the duty of the court to construe the policy most favorably to the insured, which the court failed to do, when he gave to the word "sickness," a construction inserted in the policy of insurance by the defendant, that was unusual and subject to more than one construction.

#### IV.

That if the defendant, the Insurance Company, issuing its policy of insurance, intended that the beneficiary of the insured could not recover in any event for any accident following a hernia operation, the policy should have so provided, and not so providing, but being an accident policy, the rights of the beneficiary could not be destroyed by ambiguous language.

#### V.

That the Business Men's Assurance Company, a corporation, defendant, issued its policy to the deceased in conformity with the laws of the State of Idaho and is and was bound by the laws and the decisions of said State, and under the same, the plaintiff is entitled to recover by reason of the fact that the death of the insured was an accident and that an accidental injury and resulting death, is not and cannot be construed as sickness.

#### VI.

That the plaintiff having established death by accident, the burden of proof was upon the insurance company, the defendant, to prove that the exceptions in the policy defeated recovery and that the defend-



ant failed to prove that the cause of the death of the deceased was sickness. The only basis for the court's conclusion of law that the plaintiff could not recover, being set forth in Conclusion No. V as follows:

“In this cause, the court feels it necessary to follow the wording of the Policy \* \* \* that medical treatment after a hernia operation is to be construed as sickness \* \* \* solely because it is so stated in the policy and for that reason plaintiff is not entitled to recover.”

#### VII.

That it was the duty of the court under the applicable law and the facts to give to the language and provisions of the insurance policy, the usual and ordinary construction of the same and to give to the word “sickness,” its usual meaning and construction, which the court failed to do.

#### VIII.

That the court erred in entering judgment for the defendant for the reason that the Findings of Fact, made and entered by the Court to the general effect that the death was purely accidental, and that the result thereof was tragical and out of proportion to the trivial cause, precluded the court as a matter of law from entering judgment in favor of the defendant and against the plaintiff.

/s/ B. W. DAVIS,

Attorney for Cecelia J.

Wilson.

[Endorsed]: Filed June 24, 1949.

[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

Cecelia J. Wilson, Appellant herein, designates the complete record and all proceedings and evidence in the above-entitled action to be contained in the record on appeal and the Clerk will please prepare such record on appeal herein, including but not limited to the following:

1. Complaint.
2. Answer of the defendant.
3. Amended answer of defendant.
4. Transcript of the evidence.
5. All exhibits.
6. Opinion of the court dated March 24, 1949.
7. Findings of Fact and Conclusions of law dated May 31, 1949.
8. Judgment dated May 31, 1949.
9. Notice of Appeal.
10. Bond on Appeal.
11. This designation.
12. Statement of points.

Dated this 23rd day of June, 1949.

/s/ B. W. DAVIS,

Attorney for Plaintiff  
and Appellant.

[Endorsed]: Filed June 24, 1949.

[Title of District Court and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

Business Men's Assurance Company of America, a corporation, the above-named respondent, hereby designates additional portions of the record to be included on appeal in this cause, in addition to those recited in Designation of Record on Appeal heretofore filed by the appellant, to wit:

1. Defendant's Motion to Dismiss, Motion for a More Definite Statement and Motion to Strike.
2. The Minute Entry of January 13, 1948.
3. The Minute Entry of March 17, 1948.
4. The Minute Entry of May 20, 1949.
5. The Minute Entry of May 31, 1949.
6. This Designation.

Dated this 30th day of June, 1949.

/s/ A. L. MERRILL,  
R. D. MERRILL,  
MERRILL & MERRILL,

Attorneys for Defendant and  
Respondent.

Service of foregoing Designation by Appellee of Additional Portions of Record on Appeal admitted this 30th day of June, 1949.

/s/ B. W. DAVIS,  
Attorney for Plaintiff and  
Appellant.

[Endorsed]: Filed July 1, 1949.

[Title of Court and Cause]

## CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers, to-wit:

Complaint

Motion to Dismiss, Motion for a More Definite Statement and Motion to Strike

Minutes of the Court of January 13, 1948.

Answer

Amended Answer

Minutes of the Court of March 17, 1949

Opinion

Minutes of the Court of May 20, 1949

Findings of Fact and Conclusions of Law

Minutes of the Court of May 31, 1949.

Judgment

Notice of Appeal to Circuit Court of Appeals

Bond on Appeal

Statement of Points

Appellant's Designation of Record on Appeal

Appellee's Designation of Additional Portions of Record on Appeal

Exhibits:

Plf. No. 1 Letter from B. W. Davis to Business Men's Assurance Co., 4/21/47

Plf. No. 2 Letter from Co. to B. W. Davis, 5/2/47

Plf. No. 3 Letter from B. W. Davis to Co. 7/9/47

Plf. No. 4 Letter from Co. to B. W. Davis, 7/18/47

Plf. No. 5 Beneficiary's Statement, 7/9/47

Plf. No. 6 Undertakers Statement, 7/9/47

Def. No. 9 Photostatic copy, Proof of Death

Def. No. 10 Photostatic copy, Certificate of Death.

Transcript of Testimony

are that portion of the original files as designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 1st day of July, 1949.

[Seal]      /s/ ED. M. BRYAN,  
Clerk.



[Title of District Court and Cause.]

### TRANSCRIPT

This matter was tried before the Honorable Chase A. Clark, United States District Judge, Sitting at Pocatello, Idaho, without a jury.

Appearances:

Ben W. Davis, Esq., Pocatello, Idaho, Attorney for the Plaintiff.

Messrs. Merrill & Merrill, Pocatello, Idaho, Attorneys for the Defendant.

March 17, 1948, 10 o'clock A.M.

Mr. Merrill: I have a motion for an amendment of the amended answer as the same appears in the motion which has been filed here.

Mr. Davis: I have no objection as to the time of the filing of the amendment but I do object to the filing of it for the reason, and I object to the granting of the motion to amend for the reason that it doesn't present any defense. It pleads the law of Missouri generally as to policies and the policy sued on does not have any reference to the fact that it is governed by the laws of Missouri. If the laws of Missouri governs I am satisfied that the Court will take judicial notice of that law.

The Court: I will permit the amendment subject to the objection and I will determine that at the conclusion of this matter.

Mr. Davis: The other case is set for this time

and so far as the medical testimony is concerned, it is agreeable to me and it may be agreed and stipulated that the medical evidence is applicable to both cases.

The Court: Very well, but in order not to confuse the record, if it is agreeable to counsel, and a record is later made up, it can be agreed that the Court Reporter may, in making up the record, use the same testimony and [4\*] transcribe it in full in both the records, otherwise it would be confusing to have a record here show evidence in both cases in one record,—you see all I am thinking about,—while I am not viewing or contemplating an appeal but in case there is an appeal the record would be very confusing unless testimony was introduced in each trial. The cases are not consolidated for trial.

Mr. Merrill: That is right, they are not consolidated.

The Court: Why can't it be understood that we are trying the first case and that at the commencement of the next case you shall make another stipulation as to the record.

Mr. Merrill: I think that can be done.

Mr. Eberle: Yes. And Your Honor, could it be agreed that we may both cross-examine the witnesses, both Mr. Merrill and myself because of the difference in the defendants in each case.

The Court: I can see no objection to that. Then when we try the second case it may be agreed now that any portion of the record designated may be introduced in the second case.

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\* Page numbering appearing at bottom of page of original certified Transcript of Record.

Mr. Davis: That is entirely agreeable to me, and it is also agreeable that both counsel may examine.

The Court: Then you may proceed.

Mr. Merrill: Of course, we are trying the Business Men's case first. [5]

The Court: That is my understanding.

Mr. Davis: Mr. Merrill, do you have the original letter or notice that I mailed to the Business Men's Assurance Company on April 27?

Mr. Merrill: Yes, I think I do.

Mr. Davis: Now, may I have this marked as plaintiff's exhibit?

The Court: It may be marked plaintiff's exhibit 1.

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DR. O. F. CALL

being called as a witness on the part of the plaintiff after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Doctor, will you state your name?

A. O. F. Call.

Q. Where do you reside?

A. Pocatello, Idaho.

Q. What profession do you follow?

A. Physician and surgeon.

Q. What college or school did you attend?

A. Jefferson Medical College, Philadelphia.

Q. Are you a member of any medical society?

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

The Court: I wonder if counsel can't admit this man's qualification. I know I will take judicial notice of his qualifications. [6]

Mr. Davis: I did think to show the amount of practice.

The Court: Certainly you may do so.

Mr. Davis: No, when the Court makes a suggestion I will not go against that.

Q. I will simply ask how long you have practiced, Doctor? A. Since 1920.

Q. Have you done any Post Graduate work?

A. Yes, sir.

Q. When?

A. In 1926 one winter in New York studying surgery, and an entire year in 1930 in the University of Pennsylvania post graduate surgery.

Q. You have attended in the past, or gone to Mayo's Clinic to study their technique?

A. Yes, frequently, about every other year.

Q. Doctor, you knew Mr. Wilson—Harry Wilson, deceased? A. Yes, sir.

Q. How long had you known him?

A. About twenty years.

Q. You had been his physician?

A. Yes, sir.

Q. How long had you been his physician?

A. All of that time.

Q. Doctor, prior to this operation you performed what was Mr. Wilson's general condition? [7]

A. He had ordinary good health of the average

(Testimony of Dr. O. F. Call.)

man with the exception that he had had an operation about four years ago at the Mayo Clinic, that is, four years before this last operation. He had ordinary colds the same as the average man and a little difficulty with hypertension—high blood pressure.

Q. What was this operation on April 7 for?

A. Recurrent inguinal hernia.

Q. What was his general condition when he went into the hospital?      A. Very good.

Q. That is before this last operation?

A. Yes, it was very good.

Q. When was this operation performed?

A. April 7, I think it was at eight in the morning.

Q. A regular chart was kept, a regular hospital chart written by the nurse was kept in this case?

A. That is right.

Q. Is it ordinary and customary for a nurse to report on the chart the fact that the patient snores?

A. Not ordinary.

Q. Is there a report on the chart here of continuous and loud and violent snoring by this patient?

A. Yes, sir, there is, the nurse made several reports of loud, continuous snoring, more than she had heard in other cases and she was assured——

Q. What was that, Doctor? [8]

A. She was assured that was a common thing with Mr. Wilson, that he always snored.

Q. What was the nature of Mr. Wilson's snoring in the hospital prior to his passing?



(Testimony of Dr. O. F. Call.)

Mr. Merrill: Are you referring now to his personal knowledge.

Q. Personal knowledge, Doctor, do you have personal knowledge of it?

A. Yes, I was there and heard him snoring.

Q. Was it violent and almost a spasm, would you say?

A. Sometimes you would think that he would shut off his breath and then he would catch his breath with a jerk.

Q. And would the patient jerk or move?

A. Yes, sir, he would rather jerk.

Q. Did he have an accumulation of phlegm or coughing spells?

A. No, I wouldn't say,—well, after snoring he would have a slight cough like that (indicating).

Q. Do you have the chart with you, Doctor?

A. I think it is in the Court room.

Mr. Davis: We offer in evidence exhibit marked exhibit 7, the original chart from the hospital and counsel for the defendant has taken photographic copies of this instrument and we would like to have it understood that a photographic copy may be used if the matter should remain in Court any considerable time so that the original could be returned. [9]

The Court: It may be introduced subject to withdrawal.

Q. Now, Doctor, I call your attention to the——

The Court: ——You understand that the photostatic copy may be used in lieu of this original after the trial of this case.

(Testimony of Dr. O. F. Call.)

Mr. Davis: Yes, that was my understanding. This is plaintiff's exhibit 7.

Q. I call your attention to the nurse's bedside chart or bedside notes, and to the fact that it refers twice to the fact that he was coughing, and that something was given for the cough. If the record shows that it would indicate that he was coughing?

A. Certainly.

Q. How many operations for hernia have you performed during your practice?

A. I have been doing them for twenty odd years, I would say four or five hundred.

Q. Out of that four or five hundred how many post-operative deaths have occurred in your operations for hernia? A. This one case only.

Q. Did you give this case the same general care and attention that you gave the others?

A. Yes, sir.

Q. The same attention you gave all of them?

A. Yes, sir. [10]

Q. Doctor Call, can you or would you say that post operative death from hernia is a very rare occurrence?

A. Yes, it is.

Q. What do you base that statement upon?

A. I base that upon my own experience that I have mentioned and the various clinics around the country; the statistics that we have gathered.

Q. In the case of Mr. Wilson was there anything that could have been reasonably anticipated,

(Testimony of Dr. O. F. Call.)

or was there any reason for you to expect a post operative death?      A. No.

Q. Or death by pulmonary embolism?

A. No reason that I could expect in relation to the operation.

Q. If there had been any reason for you to expect that would you have operated?      A. No.

Q. Generally in the medical profession and following the usual standards, if there is anything to indicate, or the percentage of cases show that there is a likelihood of death or that you could anticipate death would you operate?

A. I don't think that there is a surgeon in the country that would operate if he thought the man was going to die.

Q. What was the cause, in your opinion, of Mr. Wilson's death?

A. Acute pulmonary embolism.

Q. What is pulmonary embolism? [11]

A. An embolism is a foreign substance or piece of a clot flowing in the blood stream which goes through the heart; through the pulmonary artery to such a place that it can't go any farther and lodges in the pulmonary artery or branch of it. It can be a clot of blood, a fatty or foreign substance.

Q. It doesn't follow that it is a clot of blood?

A. Not necessarily.

Q. Was this pulmonary embolism caused by and a result of the hernia operation?

A. I don't think it would be anything per se connected with the operation.

(Testimony of Dr. O. F. Call.)

Q. I call your attention to the deposition of Doctor Beeman,—have you read the deposition of Doctor Beeman, Doctor Swindell, Doctor Pittenger and Doctor Stewart? A. Yes, sir.

Q. Which were taken in this case?

A. Yes, sir.

Q. Now, I call your attention to the following answer by Doctor Beeman on page eight of the deposition where he was being questioned about this case and why there would be a pulmonary embolism and death, wherein he said: “For the reason that an operation for intestinal obstruction and repair of the hernia could easily have caused a venous thrombus at that time.” Now, Doctor, that was referring to a prior operation? A. Yes, sir. [12]

Q. Continuing, “and the hernia operation on April 7, 1947, may have been the exciting factor in causing this venous thrombus to break down and form a pulmonary embolism”. Assuming that Doctor Beeman was correct in that premise and that a thrombus had been formed, it would not necessarily follow that even if there was a thrombus that it caused this particular embolism?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. That is not just clear to me, your question.

Q. Yes,—now assuming that Doctor Beeman is correct and that a thrombus may have occurred or formed previously and that it may have been the exciting factor, as he says, in the pulmonary embo-

(Testimony of Dr. O. F. Call.)

lism, now, there may be other things that would have been the exciting factor, too?      A. Yes, sir.

Q. The violent snoring that the man did, and the choking and the violent coughing may have been the exciting factor?      A. Yes, sir.

Q. And could have been?      A. Yes, sir.

Q. And in your opinion, Doctor, was that the cause?

Mr. Merrill: Objected to as leading?

The Court: It is somewhat leading, he may answer, however. It is a matter the Court has control of.

A. That is my opinion.

Q. Now, Doctor, I call your attention,—have you looked at [13] and studied and been given the definition of accident as defined in Webster's International Dictionary?      A. Yes, sir.

Q. In your opinion was the death of Mr. Wilson due to accident?      A. Yes, sir.

Q. Are you familiar with and have you studied and read this book written by TeLinde,—Richard W. TeLinde?      A. Yes, sir.

Q. This was published in 1947?      A. Yes, sir.

Q. Now, Doctor, I call your attention to a statement in there on page 87 in which he says: "Pulmonary embolism is one of the most dramatic and tragic accidents that occur in surgery". You have read that?      A. Yes, sir.

Q. Do you agree with that?      A. I do.

Q. And I call your attention to another statement on the same page where he is also discussing



(Testimony of Dr. O. F. Call.)

pulmonary embolism and where he says that occasionally there is something else causing the plugging of the pulmonary circulation which causes death, such as bronchial obstruction and so on,—do you agree with that?

A. That is a well recognized fact.

Q. Coughing and violent snoring might cause the breaking loose of a clot or foreign substance that caused the pulmonary embolism? [14]

A. Yes, sir.

Q. And is it your opinion in this case that is what did cause it?

A. Yes, sir, that is right.

Q. I call your attention to the deposition of Doctor Beeman, and that reference is made to the fact that pulmonary embolism may come from immobilization. If as stated by Doctor Beeman there had been a thrombus,—if this man had a thrombus,—Doctor, what is the treatment for thrombus?

A. Rest and quiet.

Q. Mobilization would be absolutely the wrong treatment? A. Yes, sir.

Q. That is, if the man had a thrombus?

A. Yes, sir.

Q. Was this man treated the same as other patients following a hernia operation?

A. Yes, sir, the standard form of treatment?

Q. I call your attention to a question asked of Doctor Swindell on page 13 of the deposition the question is: "Is there any substantial difference in

(Testimony of Dr. O. F. Call.)

the symptomatology of a pulmonary embolism and a thrombus", and the answer is "No." What is your answer to that, Doctor?

A. A decided difference.

Q. What is the difference between a thrombus and embolism? [15]

A. A thrombus is a large, or any clot filling a vessel, and an embolism is a little particle of that clot floating. The symptoms of the thrombus would be swelling of the part involved, an interference with the circulation,—a pain in that area, and the symptoms of pulmonary embolism is an acute tragic pain in the chest.

Mr. Eberle: If you are going to continue with this form of examination I will have to object, it is not proper to compare the testimony of one witness with that of another. It is not proper to ask this witness if he agrees with the testimony of another witness.

The Court: The question has been answered, there is nothing before the Court now.

Q. Doctor Call, I am referring now to page 15, in the testimony of Doctor Swindell: "Would the same be true of immobilization as incident to surgical procedure?" The answer: "Yes, immobilization predisposes to the formation of thrombi and emboli". Now, Doctor, does immobilization predispose to the formation of thrombi?

A. Yes, sir.

Q. What is the difference between thrombus and thrombi?

(Testimony of Dr. O. F. Call.)

A. Thrombi is the plural of thrombus.

Q. I thought immobilization was the treatment for thrombosis?

A. That is right, I misunderstood you, I thought you were talking about embolism [16]

Q. Now here is the question, Doctor. "Would the same be true of immobilization as incident to surgical procedure?" And the answer: "Yes, immobilization predisposes to the formation of thrombi and emboli". Does immobilization predispose to the formation of thrombi? A. No.

Q. Was there any indication that Mr. Wilson was suffering—strike that, please,—at the time of Mr. Wilson's death is there any indication that there was a condition of profound shock?

A. No, sir.

Q. Why do you say that?

A. Because of the symptoms present. Profound shock means rapid feeble pulse, weak heart beat; a person in a general exhausted condition.

Q. Referring to exhibit 7, Doctor, which is the hospital record and the chart, do you recall what the man's pulse was at the time of passing away?

A. About seventy-two, it never went above eighty.

Q. Did it ever go above 72,—had it ever gone above seventy-two according to that?

A. I think there is one place recorded that it was between 72 and 80.

Q. There isn't anything to indicate that the person was suffering from shock at all?

(Testimony of Dr. O. F. Call.)

A. There is not [17]

Q. Have you, in addition to your general knowledge, within the last forty-eight hours, made a study to refresh your memory and to keep you advised, or to fully advise you as to the percentage of post operative deaths from pulmonary embolism in all kinds of abdominal surgery, not hernia, but all abdominal surgery?

A. Yes, I have.

Q. What does the book of TeLinde, which I have referred to here, show the percentage of all operations to be at Mayo's Clinic?

A. Eight per cent, I think it is.

Q. No, it is five and eight-tenths per cent.

Mr. Merrill: I object to counsel testifying here.

Mr. Davis: May I show the book to the Doctor.

The Court: Yes, you may.

A. That is correct, five and eight-tenths per cent.

Q. Is the hernia operation such as you performed an abdominal or pelvic operation?

A. It is not.

Q. What is an abdominal operation?

A. You open the abdominal cavity.

Q. And what is a pelvic operation?

A. Where you open the pelvic cavity.

Q. What are the kinds of operations in which there is most danger of post-operative deaths and most pulmonary embolism? [18]

A. It is most common in female pelvic operations and in male prostate operations, and in operations in reference to the Billeni's system,—of fractures.

(Testimony of Dr. O. F. Call.)

Q. What about the operations in reference to hernia?      A. Scarcely mentioned.

Q. It is very rare, is that right?

A. It is very rare.

Q. Doctor Call, taking your own experience, in all operations you have performed over the period of years you have practiced would it exceed a thousand?

A. Yes, it is more than that, I would say several thousand.

Q. How many post-operative deaths from pulmonary embolism in all of those operations have you had?

A. I can, off-hand, think of three.

Q. Including this one?      A. Yes, sir.

Q. You have been and are Mrs. Wilson's physician?      A. Yes, sir.

Q. What was Mrs. Wilson's general condition in June and say up to the 15th of July of this year?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: It may be admitted, he may answer, this is subject to your objection. If on going into this matter the Court decides it is not material, then it will be stricken. I think you said July of this year. [19]

Mr. Davis: Of course, I meant July of last year.

A. Her health was very poor.

Q. Was it possible for you as her doctor or myself as her counsel, during the forepart of July or



(Testimony of Dr. O. F. Call.)

the last part of June to talk to her about matters in connection with her husband's death, or to transact any business with her in reference to her estate?

A. Such procedure would be very harmful to Mrs. Wilson.

Q. And it was your opinion that it should not be done?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer subject to your objection.

A. That is right.

Q. And that she should be left alone?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. That's right.

Q. What are the cardinal symptoms of pulmonary occlusion?

A. Occlusion means stopping.

Q. Would it be accompanied by pain?

A. Yes, it would be accompanied by quite severe pain.

Q. There is nothing to indicate that this man had coronary thrombosis or pulmonary occlusion.

Mr. Merrill: Objected to as leading [20]

The Court: It is leading but he may answer.

Mr. Davis: I will withdraw the question, it is not of any particular help. I think that is all, you may cross-examine.

(Testimony of Dr. O. F. Call.)

Cross-Examination

By Mr. Eberle:

Q. Did you give your deposition in this matter some time ago?      A. Yes, sir.

Mr. Eberle: May I have the deposition published?

The Court: It may be published. I think before you start on this examination we will take a ten-minute recess.

March 17, 1948, 11:05 A.M.

Mr. Davis: I would like to clear up one matter if I may before they take the witness.

The Court: Very well.

Q. Doctor Call, in asking my questions I asked you to give the cardinal symptoms of pulmonary occlusion. I used the word pulmonary instead of coronary. I meant coronary occlusion?

A. The symptoms are: intense pain, probably the most intense known to the human body; profound sweating, and one can hardly get his breath.

Q. Doctor, going back to post-operative death. What is your opinion from your own experience and based upon the study you have made of the authorities. Where death is due to [21] surgery,—due to pulmonary embolism and where pulmonary embolism is due to surgery, does that follow immediately or within twenty hours, or is it more likely to follow later?

A. It is more likely to follow from thirteen to twenty-one days later.

(Testimony of Dr. O. F. Call.)

Q. Thirteen to twenty-one days later?

A. That's right.

Mr. Davis: That is all, you may examine.

### Cross-Examination

By Mr. Eberle:

Q. Doctor Call, handing you exhibit 8 I will ask you if that is the deposition you gave recently in this case, and is exhibit A attached thereto a part of it?

A. Yes, sir, it is, that is correct.

Mr. Eberle: I offer it in evidence as a part of the cross-examination of this witness.

Mr. Davis: No objection.

The Court: It may be admitted.

Q. Exhibit A and exhibit 8 Doctor Call, exhibit A is that a photostatic copy of the hospital record?

Mr. Davis: Unless the doctor knows I will object. If he may have an opportunity to check it with the original.

The Court: Yes, certainly, when it is checked it may be substituted if that is your desire.

Q. When did you last see Mr. Wilson?

A. You mean at the hospital. [22]

Q. When did you last see Mr. Wilson on April 8?

A. I saw him just a few minutes after his death, that is the last I saw him.

Q. Someone there at the hospital called you?

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

Q. About what time in the morning of April 8 did they call you from the hospital?

A. About 4:30.

Q. In the morning? A. Yes, sir.

Q. Mr. Wilson had died before you arrived?

A. I immediately dressed and went over, as I got there he was expiring.

Q. It took you about a half hour to get there?

A. I was in bed when they called.

Q. Prior to that when was the last time you had seen Mr. Wilson?

A. Eleven o'clock in the evening.

Q. The evening of the seventh?

A. Yes, sir.

Q. And is your diagnosis of his death as a result of pulmonary embolism based upon the hospital record?

A. Based upon personal analysis of the case.

Q. At eleven o'clock when you last saw him did he show any indication of the terminal period?

A. No, sir.

Q. At eleven o'clock when you saw him there was no symptomatology [23] of acute heart failure?

A. That's right.

Q. When you saw him in the morning he was just about expired? A. Yes, sir.

Q. And on that—that is what you based your diagnosis on?

A. It would have to be on that and on the record.

Q. Is it difficult to diagnose death of pulmonary

(Testimony of Dr. O. F. Call.)

embolism as distinguished from acute heart failure?

A. I don't think so. I might say this: If you want to be absolutely certain—if you want absolute proof you would have to have a post-mortem.

Q. You cannot be absolutely sure without a post-mortem?

A. You have the record and all these circumstances——

Q. ——But, Doctor, when you arrived at the time of death, when you arrived at the hospital what did you find to base your diagnosis on?

A. The record of the nurse.

Q. What else?

A. He was expiring suddenly.

Q. Those two things are the only basis for your diagnosis?

A. That's right.

Q. How many times did you see Mr. Wilson between the time of the operation at eight or nine on the morning of the 7th and eleven o'clock that night?

A. I cannot tell you the exact number of times. I was in and out of the room several times. [24]

Q. You operated between eight and nine?

A. Yes, sir.

Q. And you went in again shortly after the operation?

A. Shortly after nine, I would say.

Q. He was under the anesthetic?

A. He had a spinal and he was not asleep.

Q. When did you see him again?



(Testimony of Dr. O. F. Call.)

A. In ten or fifteen minutes. I was there all morning taking care of hospital work. I saw him several times.

Q. Several times before noon, would you say?

A. Yes.

Q. In the afternoon when did you see him?

A. About four-thirty.

Q. When did you see him again?

A. I dropped in again around nine o'clock.

Q. About nine and then again about eleven that evening?

A. That's right.

Q. In your opinion, repair on this hernia was necessary?

A. It was very advisable. The man could live without it but it was very advisable.

Q. You wouldn't operate unless it was necessary?

A. To the reconstruction of good health it was necessary.

Q. The surgery you performed was in the method usually followed by skilled surgeons?

A. That's right. [25]

Q. Now then, Doctor, before you left at noon was there any snoring?

A. As he would drop off to sleep under the opiate.

Q. Under the opiate?

A. Yes.

Q. He was snoring?

A. Of course, at times he was not asleep.

(Testimony of Dr. O. F. Call.)

Q. If he was asleep he was snoring?

A. Yes, sir.

Q. How often was he snoring?

A. I didn't keep track of that. I know I would talk to him and he would joke with me, but when he went to sleep he would be snoring.

Q. At nine o'clock he was snoring?

A. At nine o'clock he was joking about a bridge game part of the time.

Q. At eleven o'clock he was snoring?

A. Part of the time, yes.

Q. When did he start to cough?

A. During the night.

Q. Was he coughing at nine o'clock?

A. Between nine and eleven.

Q. You saw him about nine and again about eleven?

A. Yes.

Q. You wouldn't know except by the hospital record that he was coughing between nine and eleven? [26]

A. That is the only way I would know. I wasn't there to hear it.

Q. I think you said that embolism was not the result of the operation?

A. I don't think it had anything to do with the operation per se.

Q. What do you mean "per se"?

A. Per se is a direct connection. It would mean that the operation would have no direct connection, not the direct cause of death. It means, in and of itself.

(Testimony of Dr. O. F. Call.)

Q. In other words, it may have been the cause, but not in and of itself?

A. Not in and of itself.

Q. It may have been the cause?

A. It could have been the exciting cause.

Q. It could have contributed to the embolism?

A. Yes.

Q. If this would have happened without the operation is it your opinion that Mr. Wilson would have died—without the operation?

A. He might have been going down the street; he might have been coughing or snoring; he might have fallen.

Q. And, of course, he would have died?

A. Yes, sir, he could have.

Q. And he might have died at home, in bed? [27]

A. Absolutely.

Q. If the embolism was not caused by the operation, what in your opinion was it caused by?

A. Extreme coughing and snoring is enough to break loose a part of a thrombus and make the embolism.

Q. Was the coughing and snoring incident to the operation?

A. Partly connected with the operation. The sedative made him snore more than he would at other times.

Q. What pre-operative medication did you give?

A. I gave opiates and barbitrates.

Q. That would wear off in how long?

(Testimony of Dr. O. F. Call.)

A. In about six hours.

Q. What did you give after that?

A. Opiates.

Q. Is that usual in operations of this type?

A. Yes, sir.

Q. And the opiates putting him to sleep made him snore?      A. Yes, sir.

Q. Did you know that he snored?

A. Yes, sir, I did.

Q. You knew that was a hazard?

A. I knew that he always snored when he slept.

Q. Doctor, what did that cough come from?

A. As he snored a little phlegm would get in his throat, it would collect and drop in his throat, causing him to cough. [28]

Q. —coughing as you suggested could have caused the embolism, could a heart condition—

A. He didn't have a heart condition.

Q. Atelectasis of the lungs?

A. He didn't have atelectasis.

Q. Could it have come from immobilization?

A. Hardly.

Q. What could it have come from?

A. From the phlegm that came during his sleep and caused the coughing.

Q. What other possible causes?

A. The possible causes are numerous, he could have had metastatic congestion.

Q. Post-operative congestion?      A. Yes.

Q. If that was the case, it would be due to the operation?

(Testimony of Dr. O. F. Call.)

A. Yes, if he had that it would; I don't say he did have.

Q. What else could it have been?

A. The man could have had a cough, a cold.

Q. Ether pneumonia?

A. But he didn't have ether. You were asking for the possibilities.

Q. Do you think, Doctor, that the snoring was sufficient to cause a breaking of a thrombus?

A. His snoring was so severe, well, he would hold his breath and then he would jerk when he would take in his breath [29] he would draw this phlegm into his throat.

Q. Doctor, where would this break loose—this thrombus?

A. Wherever the embolism was formed.

Q. Where was this embolism?

A. In the veins of the pelvis, was likely leading from the pelvis circulation.

Q. How was the clot formed?

A. Due to a former operation where he had a bowel obstruction. He had this thrombus, it happens in lots of people.

Q. Do you think it could have broken loose after four years?

A. It is entirely possible.

Q. Was it possible to arise in the calf of his leg?

A. He didn't have anything in the calf.

Q. Where do they arise generally?

A. In a branch of the Illiac venis.



(Testimony of Dr. O. F. Call.)

Q. Counsel questioned you quite a little about immobilization, do I understand you are of the opinion that immobilization cannot, or could not cause pulmonary embolism?

A. Immobilization does not cause embolism. Mobilization causes embolism.

Q. Why do people have phlebitis?

A. That is not embolism.

Q. What was that, Doctor?

A. That is not embolism, you are thinking of thrombosis of the vein. [30]

Q. The difference between thrombosis and embolism is, one stays in the vein and the other floats?

A. A small portion breaks loose.

Q. Then you call it an embolus?

A. Yes, that's right.

Q. Embolism arises from any kind of immobilization—or mobilization, you said, Doctor?

A. Where there is a predisposing cause.

Q. Does immobilization cause stagnation of the blood in the veins?

A. It does.

Q. And stagnation predisposes embolism?

A. Predisposes thrombosis.

Q. And then it breaks off because of some acute action?

A. That is mobilization.

Q. Acute or undue action?

A. Yes, sir.

Q. Do thrombosis or thrombus come in due course of treatment without surgery?

(Testimony of Dr. O. F. Call.)

A. Yes, sir, typhoid produces thrombosis, varicose veins, injury, external violence, all produce thrombosis.

Q. Do I understand that you have had only three post-surgical deaths in your practice?

A. If you do you are wrong. I said three pulmonary embolism deaths.

Q. How many post-surgical deaths? [31]

A. I cannot answer that at this time but three pulmonary embolism, post-surgical deaths.

Q. When you commence surgical procedure you are fully aware that you can expect pulmonary embolism?

A. We know it is possible but we don't expect it.

Q. It is foreseeable in any case?

A. It is not foreseeable. If it was we would not be operating like we do.

Q. Do you have to take safeguards?

A. Yes, sir.

Q. Then if it is not, and was not foreseeable, why do you take safeguards?

A. It is a possibility but it is not foreseeable.

Q. It is foreseeable in the sense that it might happen?

A. It is a possibility but it is not foreseeable.

Q. Perhaps we are playing on words, Doctor. When you start surgery is it something that might happen in every case?

A. You think of it. It might happen.

Q. Isn't it a fact that the majority of surgical

(Testimony of Dr. O. F. Call.)

cases—strike that—isn't it a fact, Doctor, that the majority of surgical deaths are due to embolism?

A. No, sir.

Q. Have you ever read Cecil on medicine?

A. Yes, sir.

Q. Is it a standard work?

A. Yes, sir. [32]

Q. Is it a standard work?                      A. Yes, sir.

Q. If he said the majority of post-operative deaths are due to pulmonary embolism in hernia cases, would you agree with that?

A. It would be one man's opinion.

Q. Is the Journal of the American Medical Association a reputable publication?

A. Yes, sir, it is.

Q. Do you know Doctor Barnes of the Mayo Clinic?

A. I know of him indirectly.

Q. Would you say this was a correct statement in an article in the Journal of the American Medical Association by Doctor Barnes: "If such a percentage of deaths from pulmonary embolism is applicable to the general population and the ratio remains the same in succeeding years, it may be assumed that three million, sixty-eight thousand people now living in this country will die eventually of pulmonary embolism."?

A. That does not refer to surgical pulmonary embolism.

Q. Pulmonary embolism of all kinds?

(Testimony of Dr. O. F. Call.)

A. Yes.

Q. Now, Doctor, pulmonary embolism can come from immobilization?

A. Pulmonary embolism can come from having a baby, from typhoid, from scarlet fever and many other causes. [33]

Q. Would you call a person dying from pulmonary embolism at childbirth an accidental death?

A. I don't know whether I would or not.

Q. Is it reasonably foreseeable in every childbirth?

A. It is not foreseeable, it might be thought of.

Q. You take it rather lightly in case of childbirth?

A. You might think about it. You can't say that it is foreseeable. It must be so you can see it in order to say it is foreseeable.

Q. Well, it is something you can anticipate?

A. It is something you can think of.

Q. It is a hazard in operations—it is a risk?

A. Yes, it is a risk.

Q. That is true in hernia operations?

A. That is true in any operation.

Q. Isn't it true that the rate of death from pulmonary embolism is five times as high from inguinal or femoral hernia operations than it was from acute appendicitis operations, excluding peritonitis or cases with ruptured appendix?

Mr. Davis: Objected to as immaterial.

The Court: He may answer.

A. My opinion on that would be based upon sta-

(Testimony of Dr. O. F. Call.)

tistics taken from other men against this man's statistics.

Q. You would have no personal knowledge on that? A. No. [34]

Q. Isn't it a fact that the reason—if it is a fact, Doctor, that there are five times as many post operative deaths following hernia operations than following appendix operations, is due to the fact that hernia occurs later in life, and repairs to hernia are made later in life than appendectomies?

A. That is not my opinion that it is always the case.

Q. Do you think Doctor, a man sixty-one is more pre-disposed to embolism than a much younger man? A. Sure, that is true.

Q. Mr. Wilson was more pre-disposed than a younger man—now Doctor, getting to the question of accident, let me ask you this, take the case of post-operative pneumonia is that an accident?

A. You mentioned before either pneumonia, there is that and the person who has respiratory trouble.

Q. With that person it would not be post-operative? A. No, sir.

Q. In case of death due to post-operative shock, would you call that accidental?

A. No, I don't think so, that was due to a physical condition.

Q. Doctor, do you think in this case that this



(Testimony of Dr. O. F. Call.)

man had thrombosis?           A. I think so.

Q. That was a pre-existing condition?

A. I think so. [35]

Q. Therefore it wasn't an accident?

A. It was accidental.

Q. But the pre-existing condition in the pneumonia and shock case was not accidental?

A. They are not comparable, no, they are not comparable to embolism.

Q. It was a pre-existing condition and surgery caused his death in the one case; here you say there is a pre-existing condition which caused his death because of embolism?

A. One is pneumonia from an existing condition, a respiratory condition and then there would be the other condition that also existed——

Q. Just a moment Doctor, let's take the other case, where the shock was not observed, would that be an accident?

A. That is not always an accident.

Q. Post operative shock?

A. Post operative shock, that is a condition due to the fact that the patient's condition was such that he couldn't stand surgery.

Q. Is that accidental?

A. That is incident to the operation.

Q. In all cases of surgery these various things being rare, are nothing but natural consequences in a certain number of cases?

A. You may say they are things to be expected in a certain number of cases. [36]

Q. They follow in a certain number of cases as a natural consequence?

A. They are not natural.

Q. When you operated for the repair of the hernia—strike that—when you operate for the repair of any hernia and there is a pre-existing condition in the venous system that results in death, are those things a natural chain of events, when you start to repair that hernia, due to the condition existing when you start your operative procedure?

A. Referring now to the case of the embolism.

Q. I am taking that assumption.

A. Then in that case the pulmonary embolism would be from violent exercise or exertion coming from something after the operation.

Q. Which would be incident to the operation?

A. Following the operation.

Q. And incident to the operation?

A. Well, like a man being killed in a car accident, it is incident to riding in the car.

Q. Those things you recited followed through to the death?      A. That is right.

Q. If you hadn't started to repair the hernia would the man have died?

A. The man could have been walking down the street and be seized with a coughing spell and with the coughing and expectoration have died of an embolism. [37]

Q. In this case if you immobilized him without surgery and had not started to repair this hernia would he have died?

(Testimony of Dr. O. F. Call.)

A. Immobilization does not produce embolism.

Q. Then it was your repairing of the hernia which, through a chain of events all resulted in his death?

A. It is incident to it.

Q. Are you of the opinion that the condition of the venous system is a disease entity?

A. It may be a disease entity or not.

Q. The condition of the venous system is a co-existing condition with surgery, depending on that condition you have certain natural results, is that so Doctor?

A. If you have a diseased venous system you can expect untoward results.

Q. Any condition of this system which affects a person following surgery, is a co-incident condition following surgery, is that not true?

A. That's right.

Q. Are you of the opinion that there are potential blood clotters as well as bleeders?

A. Yes.

Q. What test did you make for the clotting index?

A. The clotting time and bleeding time.

Q. Will you show that on the hospital chart?

A. I am not sure it is there, it is done in the laboratory and [38] I am not sure whether it is here or not. It is not always done. There is a laboratory report here and it shows the R B C or red blood count 4,300,000 W B C, white blood count 7500 H B 15.2, that is hemoglobin, there is other information on this chart but it does not show

(Testimony of Dr. O. F. Call.)

clotting time, all the information shows a normal condition. It does not, however, show any report of clotting time.

Q. So that there might have been a condition in the venous system or the clotting potential that may have contributed to this embolism?

A. We can prove here that he had a normal blood count, a normal hemoglobin and we don't expect a departure in clotting.

Q. But that is not always true?

A. That's right.

Q. The blood chemistry might have been such that he was a potential clotter?

A. We have no proof either way.

Q. If that was the case it would be a condition that existed?

A. Assuming that he was a potential clotter.

Q. There was no test that we know of to show that he was or not?      A. No test was made.

Q. Is the cough such as mentioned a symptom, or symptomatic of a heart involvement?

A. Not necessarily.

Q. Is it a symptom of heart disease? [39]

A. One of the symptoms.

Q. I may be mistaken Doctor, but did you make the statement that in surgical procedure there was never any reason to expect embolism?

A. I didn't make that statement.

Q. It is still the greatest scourge to surgery?

A. One of the greatest.

Q. Since penicillin and these other drugs, it is



(Testimony of Dr. O. F. Call.)

still the greatest scourge?      A. I think it is.

Q. It always stares you in the face?

A. You are trying to make me say that you expect it, that is not right.

Q. You can anticipate it?

A. No, you cannot anticipate it.

Q. Why are measures taken to avoid embolism?

A. Because of the possibility.

Q. You say "possibility" instead of expectation?

A. No—it is a possibility.

Q. It is a hazard—it is present?

A. It is a possibility.

Q. What measures did you take to avoid it Doctor?      A. What did I take.

Q. Well, what measures do you take?

A. Have the patient moved around.

Q. Pre-operative measures? [40]

A. We look for things that might cause infection, that is one thing—from these examinations we look for anything that may cause any infection and some use anti-clotting substances, Heparin and so forth.

Q. They protect against it by anti-clotting substances and thus reduce the clotting possibility?

A. It is a new thing, done in some clinics.

Q. You didn't do it?

A. I did not. Ninety per cent do not. It is not without danger.

Q. Doctor, is this a correct statement of the distinction in the diagnosis between pulmonary embolism and acute heart failure: At the outset of



(Testimony of Dr. O. F. Call.)

pulmonary embolism—rather, at the onset of a pulmonary embolism there is a pallor which is succeeded by cyanosis, while in acute heart failure cyanosis is present from the first?

Mr. Davis: I will object to that question unless—no, I will withdraw the objection.

Q. What I refer to is the diagnosis of pulmonary embolism and acute heart failure. The only difference is that at the onset of a pulmonary embolism there is a pallor which is succeeded by cyanosis, while in acute heart failure cyanosis is present from the first.

A. The time element in acute heart failure might be the difference, but the color, cyanosis is also present in embolism. [41]

Q. This patient was operated at eight in the morning and at eleven that night he started on the last terminal period? A. No.

Q. You operated at eight or nine in the morning?

A. Yes sir.

Q. And at eleven that night he started on the last terminal period?

A. He certainly did not.

Q. That is your opinion of this hospital chart Doctor? A. That is my opinion.

Q. Doctor Call, commencing about midnight of April 8, at 12:30 it says "respiration very irregular, deep at times then patient seems to cease breathing for a few seconds and cyanosis of lips is obvious."

A. Yes sir.

(Testimony of Dr. O. F. Call.)

Q. And you think he had started on the terminal period?      A. No, sir.

Q. In this it says——

A. It says there that the pulse is irregular but strong.

Q. At 12:30 the chart shows cyanosis of lips, will you explain what cyanosis is?

A. It means a blue color of the skin, particularly the face due to lack of aeration in the lungs; that can come from holding one's breath. By snoring they stop breathing and also by the swallowing of the tongue, that is what this patient was doing. [42]

Q. Did this patient do that at this time?

A. He was snoring all afternoon and all night. He was snoring at intervals all evening.

Q. You were there two or three times?

A. In the afternoon two or three times and at night again.

Q. Referring to 12:30, do you see any record of snoring when he started to turn blue?

A. He snored long before 12:30. The nurse doesn't chart the snoring at 12:30.

Q. The last time there was a record of it was 11 o'clock?

A. 11 o'clock, pulse good and color good, expectoration of phlegm, respiration irregular but deep.

Q. And at 12:30 respiration very irregular and deep.      A. Yes sir.

Q. How do you account for his turning blue at midnight?

(Testimony of Dr. O. F. Call.)

A. I account for it from the fact that he was snoring whenever he was asleep and holding his breath.

Q. You are speculating on that?

A. It is a circumstance. It is not in the record but the nurse mentioned him snoring when I was there.

Mr. Eberle: I move to strike what the nurse said, if she is available they can get her.

The Court: That portion of the answer may be stricken.

Q. You are of the opinion that the clot broke loose from the [43] pelvic veins?

A. That is the most probable place it would be.

Q. You don't think that clot could have come from the manipulation in the surgical procedure?

A. I don't think so.

Q. This clot might have come from any other portion of the venous system—in the extremities?

A. Particularly from the pelvis, that is the most common.

Q. If he coughed on the street the same thing could have happened?

A. It could have happened, where there is a pre-existing thrombus.

Q. He could have been sitting in an arm chair and coughed and he could have died?

A. Yes, they have been known to die during the process of even giving an enema.

Q. Are those accidents?

(Testimony of Dr. O. F. Call.)

A. That is according to the definition of accident.

Q. That could happen in any case?

A. Sure.

Q. Assuming that a person has been to you for examination or in regard to a heart involvement, and you use the stethoscope, take x-rays of the chest, cardiograms both before and after exercise, taking all the tests you know and you find no pathology and the next day that man died of coronary occlusion or acute heart failure, would you call that an accident? [44]

A. I don't know. It is something that is unexpected. After all these tests it certainly is something that is unexpected.

Q. Then you would say it is accidental?

A. I don't know. I didn't say that.

Q. Isn't it liable to happen?

A. Yes, it is unexpected.

Q. It is something you can anticipate at any time in any person? A. I guess so.

The Court: We will adjourn at this time until 1:30 this afternoon.

1:30 P.M., March 17, 1948

Mr. Eberle: I would like to offer Exhibit 9 at this time, being a photostatic copy of the physician's report.

The Court: If there is no objection it may be admitted.

(Testimony of Dr. O. F. Call.)

DEFENDANT'S EXHIBIT 9

Proofs of Death                      Physician's Statement No. 2

This statement must either be typed or entirely in the handwriting of the physician who should give additional details on the other side of this sheet.

1. What was the deceased's full name? Harry H. Wilson.

2. How long had you known deceased? For 20 years.

3. Where did deceased reside at time of death? Pocatello, Idaho.

4. If you know, state what was deceased's former residence. Pocatello, Idaho.

5. If you know, state what were deceased's several occupations. Merchant.

6. State as accurately as you can the age at death and the following facts in regard to deceased's personal appearance: Age: 61. Height: 5 feet 10 inches. Color hair: Gray. Approximate weight in health: 175 lbs. Color of eyes: Blue.

7. (a) Where did death occur? (a) Pocatello, Idaho, St. Anthony Hospital. (b) What was the date of death? (b) April 8, 1947.

8. How long had you been the medical attendant or adviser of deceased? Fifteen years.

9. (a) For what disease did you treat or advise deceased prior to last illness? Ordinary colds. (b)



(Testimony of Dr. O. F. Call.)

Give date, duration and result of each. (b) Cholecystectomy in 1943.

10. (a) What disease was the immediate cause of death? (a) Pulmonary Embolism. (b) How long, in your opinion, did deceased suffer from this disease? (b) blank. (c) Was death due to an accident? (c) Yes, providing Pulmonary Embolism is classed as an accident. (d) If so, give date and full particulars. (c) blank.

11. (a) From what other important disease, if any, did deceased suffer? No. (b) Give, as nearly as you can, the duration of each one. (b) blank.

12. When were you first consulted by deceased, or by any relative or friend, for the affection which either directly or indirectly caused death? blank.

13. From what date was deceased confined to the house, or prevented from attending to business? April 7, 1947.

14. Was there a coroner's inquest or a post-mortem examination held? State which, by whom, and the result. No.

15. Did any other physicians attend deceased during last illness? If so, give name and address of each. No.

16. (a) Where did you receive your medical education? (a) blank. (b) What is the date of your graduation? (b) blank.

(Testimony of Dr. O. F. Call.)

Dated at Pocatello, Idaho, this 22nd day of April, 1947.

/s/ O. F. CALL,

Post-Office Address: Pocatello, Idaho.

State of Idaho,

County of Bannock—ss.

### OATH

On this 22nd day of April, 1947, personally appeared before me the above-named O. F. Call, who subscribed the foregoing statement before me and made oath that the foregoing answers are each and all true.

[Official Seal] LAURA S. GOUGH,  
Notary Public, Pocatello, Idaho.

This statement must be sworn to before an officer authorized by law to administer oaths. If sworn to before an officer not using an official seal, his authority and the genuineness of his signature must be attested by the proper Clerk under the seal of his office.

(Note Instructions On Reverse Side)

### SPECIAL INSTRUCTIONS

In furnishing this blank the Company does not admit there was any insurance in force on the life in question and expressly reserves all its rights and defenses.

Statement No. 2 should be made by each physician in attendance during the two years preceding death,

(Testimony of Dr. O. F. Call.)

and must either be typed or entirely in their own handwriting. However, when the insurance has been in force for two years or more, and the insured's death occurred at home, only the statement of the physician in immediate attendance at the time of death need be submitted; the Company reserving the right to ask for further proof if necessary.

In answer to Questions 9, 10 and 11, a full statement of each Pathological Process, especially as to its duration and results, should be given.

Where death is the result of Accident or Injury, the word Lesion may be understood to replace the word Disease, in Question 10.

Such indefinite terms as Heart Failure, Exhaustion, and the like, should be avoided, unless full details are added.

Where the spaces provided for the answers are too small, such details as seem desirable should be given below.

This statement must be sworn to before an officer authorized by law to administer oaths. If sworn to before an officer not using an official seal, his authority and the genuineness of his signature must be attested by the proper Clerk under the seal of his office.

When a coroner's inquest has been held, a copy of the verdict, duly certified, must be furnished with this statement.

Every question must be distinctly and fully an-

(Testimony of Dr. O. F. Call.)

swered, and the Company reserves the right to require further information should it be deemed necessary.

The intervention of any third person is not necessary for the collection of an approved claim, and the payment of a commission to any person for services in regard to such claim is unnecessary.

Q. Doctor, when you referred to snoring you referred to heavy breathing where the jaw muscles are relaxed and there is a vibrating of the palate?

A. Yes, breathing through the mouth with the mouth open.

Q. Snoring is a vibrating of the palate?

A. Yes.

Q. That is because of relaxation of the jaw muscles.

A. Yes, sir. [45]

Q. When you give a sedative it relaxes the jaw muscles and the mouth opens, the palate vibrates and that is snoring?

A. In some people.

Q. In this case?

A. This opiate relaxed the body as a whole.

Q. This sedative you gave Mr. Wilson was proper was it?

A. Yes, sir.

Q. As a natural consequence the jaw muscles relaxed?

A. You can say that except in specific cases.

Q. In this case?

A. I assume it did.

Q. His mouth went open and in breathing his palate vibrated?

A. Natural snoring.

(Testimony of Dr. O. F. Call.)

Q. Where there is a sedative or opiate, because of the relaxed condition, secretion runs down the trachea? A. Yes, sir.

Q. That is true in any case where you have a sedative? A. No.

Q. Why?

A. Because a lot of people don't relax the jaw muscles.

Q. Where there is a relaxation it is true?

A. Yes, sir, and it produces snoring.

Q. And labored breathing with the relaxation of the jaw muscles is not uncommon in post operative procedure?

A. In varying degrees. Some will snore and others won't; particularly those who snore anyway, they will snore. [46]

Q. The sedative relaxes the muscles and you have labored breathing because of the sedative?

A. No. The sedative relaxes the body as a whole. In a certain number of people it relaxes enough so that the jaw will drop.

Q. It is not uncommon?

A. It is not very common.

Q. It is a natural consequence of giving sedative in many people? A. A few people.

Q. You only have relaxation and labored breathing in a few people? A. That is right.

Q. It is common in those people under opiates?

A. If you have a person who snores.

Q. Where you have snoring and relaxation after a sedative the secretion flows down the trachea?



(Testimony of Dr. O. F. Call.)

A. Yes, sir.

Q. And a person under opiates makes an effort to clear his throat?

A. Not under opiate, but when he is not under he does.

Q. When he wakes up and finds this mucous in the trachea he tries to clear his throat?

A. Yes, that is natural.

Q. That is natural in the post-operative period?

A. In any case where there is mucous gathering in the throat.

Q. You encourage them to get this mucous up?

A. Yes, sir.

Q. If you don't, what does he get?

A. Metastatic congestion and atelectasis.

Q. So you encourage him to clear his throat?

A. Yes, sir.

Q. That is the normal process?

A. That's right.

Q. Does the vibration of the palate make any difference to the secretion as that got down in the throat if the person snored?

A. I don't see much difference.

Q. So it doesn't make any difference whether he snored or not?

A. Snoring is apt to draw more mucous down.

Q. Would the mere fact that the palate vibrated make any difference in the amount of secretion?

A. That doesn't make secretion?

Q. That makes snoring?

(Testimony of Dr. O. F. Call.)

A. Yes, snoring is a nasal sound.

Q. I thought you said that it was a vibration of the palate? A. That is part of it.

Q. It makes the noise?

A. Only a part of it.

Q. And heavy snoring doesn't make any difference to the amount of mucous going down the trachea? A. That is right. [48]

Q. Following an operation where you give an opiate or sedative there is a relaxation and a normal amount of mucous going down the trachea?

A. That's right.

Q. And the patient is encouraged to cough that up when he wakes up? A. That is right.

Q. When did you first decide that this death was accidental?

A. Shortly after the operation when I was there at five o'clock in the morning.

Q. Handing you Exhibit 9, Doctor, will you give us the date of that?

A. The 22nd of April, 1947.

Q. That was about two weeks after the time you mention?

A. Yes, it was on the 7th he died, no, the 8th.

Q. At that time you were not sure that he died of an accident?

A. I didn't make any mention of accident, I mentioned pulmonary embolism.

Q. The question whether it was an accidental death, what was your answer to that?

A. Yes, providing pulmonary embolism is classed as an accident.

(Testimony of Dr. O. F. Call.)

Mr. Eberle: I believe that is all. I think however, Mr. Merrill has some questions.

The Court: Very well. [49]

Cross Examination

By Mr. Merrill:

Q. Doctor Call, is it your thought that the death of Harry H. Wilson was due to embolism?

A. Due to embolism——

Q. Let me finish the question. Do you think, and is it your thought that the death of Harry H. Wilson was due to embolism independent of all other causes?

Mr. Davis: I don't think that is answerable and I object to it for that reason. It cannot be answered. The question should recite independent of what other causes.

The Court: Of course, the question here is whether the operation was the cause or contributed to or was a contributing cause of the death. The other cause would be immaterial, however, he may answer.

A. An embolism has to have a basic cause for its formation, therefore, the embolism would be the immediate cause of death but it would have to have a basic cause for formation.

Q. Therefore, a death caused by embolism, was not that death caused by that independent of and from all other causes?

A. I cannot answer that yes or no.

(Testimony of Dr. O. F. Call.)

Q. Would there have to be a cause for the embolism?      A. Yes, sir.

Q. You say the immediate death was due to the embolism?      A. Yes, sir. [50]

Q. Doctor, what is herniorrhaphy?

A. Repair of a hernia.

Q. Was this embolism due to a herniorrhaphy?

A. No.

Q. I hand you what has been marked as Defendant's Exhibit 10.

Mr. Davis: I object to the witness being examined on this unless it is shown to him.

Mr. Merrill: Certainly.

Q. Do you recognize that?

A. A certificate of death.

Q. Did you prepare it?      A. Yes, sir.

Q. And certified to it?      A. Yes, sir.

Q. That is a certified copy of the death certificate of the death of Harry H. Wilson?

A. I assume it is, it looks like it.

Mr. Merrill: I now offer in evidence the exhibit which is the certificate of death of Harry H. Wilson.

Mr. Davis: This is the certified copy you got from the bureau of vital statistics?

Mr. Merrill: Yes.

Mr. Davis: No objection.

The Court: Admitted. [51]

(Testimony of Dr. O. F. Call.)

DEFENDANT'S EXHIBIT 10

Certificate of Death

State of Idaho

April 22, 1947

United States

Department of Commerce

Bureau of the Census

State File No. 153025

Local Reg. No. 16

Reg. Dist. No. 510

1. Place of Death:

(a) County: Bannock

(b) City or town: Pocatello

(c) Street Address: No. 7th Ave.

(d) Death Occurred Inside? ☒ Outside? ☐ . . . .  
city or town.

(e) Died in a Home . . . . Hospital ☒ Institution  
. . . . Other place . . . .

(f) Name Hosp. or Inst.: St. Anthony. Stayed:  
1 day.

(g) Lived in this county: 36 years . . . . months  
. . . . days.

Note: For a person residing in this county less than  
1 year, give former residence under item 2.

2. Usual Residence of Deceased: (Always fill in  
these)



(Testimony of Dr. O. F. Call.)

Immediate Cause of Death: Pulmonary Embolism. Duration: Sudden.

Due to: Herniorrrophy. Duration 4 hours.

23. Attendant's Own Signature: /s/ O. F. Call.  
and Address: Pocatello, Idaho. Date: 4/10 1947.

(For additional space, use reverse side)

State of Idaho,  
County of Ada—ss.

This Is to Certify That this is a photostatic copy of a certificate filed in the Idaho Department of Public Health under Title 38, Idaho Code Annotated.

Date Issued March 11, 1948.

/s/ JOHN W. WRIGHT,  
Director of Vital Statistics.

Q. In answer to the question "immediate cause of death" you write "pulmonary embolism" and under "duration" you write "sudden"?

A. Yes, sir.

Q. And in answer to the question "due to" you say: "herniorrhaphy" and under "duration" again you write "24 hours"?

A. Yes, sir. May I qualify that statement? In all death certificates it is required that we give the cause of death and anything that had anything to do with it, and any connection. There could have been three or four causes contributing to the immediate cause of death, herniorrhaphy could only be a contributing cause.

(Testimony of Dr. O. F. Call.)

Q. What did you mean when you answered the question "due to," by using "herniorrhaphy"?

A. I meant it followed the herniorrhaphy.

Q. At the time you made this certificate you felt that the herniorrhaphy or the hernia operation did have some effect upon the embolism, that the embolism was caused from the operation?

A. As a contributing cause.

Q. You admit that the hernia operation was a contributing cause?

A. A contributing cause, yes, we will have to admit that.

Q. Harry H. Wilson had a hernia—withdraw that—Harry H. Wilson was operated on for hernia because, of course, there was some need for it? [52]

A. That's right.

Q. Twenty-four hours after, or about that time, following the operation he had what you call an embolism, pulmonary embolism?

A. Not what I call it; he had a pulmonary embolism.

Q. What you have termed a pulmonary embolism?      A. Yes, sir.

Q. That pulmonary embolism was a contributing cause, or—no, strike that please—Doctor, that pulmonary embolism was contributed to by the operation?      A. As a secondary cause.

Q. A contributing cause?      A. Contributing.

Q. What could have been the primary cause if the hernia was the contributing cause?

(Testimony of Dr. O. F. Call.)

A. Primarily it was due to the fact that there was a thrombus in the venous system.

Q. How do you know that?

A. From post mortems in thousands of cases.

Q. You said that you would not be sure without a post mortem?

A. I testified that I could not be sure without a post mortem, yes, sir, you are right.

Q. You cannot say positively that he died from an embolism?

A. From circumstances, evidence and history of the case only.

Q. You have no evidence that this clot came from any source [53] other than the hernia operation?

A. I cannot answer that yes or no.

Q. Do you have any evidence whatever that if he died from pulmonary embolism, that embolism came from any other source than this operation?

A. Yes, sir.

Q. What evidence do you have?

A. The evidence is what you would call circumstantial evidence.

Q. When did you come to the conclusion that he died from snoring, Doctor?

A. We came to the conclusion that he died from pulmonary embolism immediately after his death. We search our records before we make a decision; we try to explain it on a basis of existing facts. It is true in any case of death if it is not from external causes that you have to have a post mortem in order

(Testimony of Dr. O. F. Call.)

to make a positive statement but we do have enough evidence to make it relatively sure. We came to this conclusion after an examination of the case and an examination of the records of the case.

Q. What records?

A. The hospital and operative record.

Q. That is introduced in evidence?

A. Yes. That a herniorrhaphy was performed could be a contributing cause but twenty-four hours after the operation is too soon to have the embolism in the region of the hernia because of that operation. [54]

Q. If you thought it was done by snoring why didn't you put it on the death certificate?

A. No place for it.

Q. What does the next sentence mean?

A. The same—herniorrhaphy.

Q. What was the herniorrhaphy due to?

A. Due to the operation at Mayo's.

Q. It all comes to this: If Harry H. Wilson had no hernia he would not have had an operation?

A. Sure.

Q. If he had no operation he would have had no herniorrhaphy?

A. That's right.

Q. If he hadn't had the herniorrhaphy he would have had not embolism?

A. We don't know that.

Q. If there had been no operation there would have been no death?

A. We don't know that.

(Testimony of Dr. O. F. Call.)

Q. It is probable that his death was due to the fact that he was operated on?

A. A contributing cause.

Q. You are sure of that? A. Yes, sir.

Q. That it was a contributing cause?

A. That's right.

Q. No doubt about that? [55] A. No.

Q. You would not say that if there had been no operation that Harry H. Wilson would have died on the 8th of April at 5 o'clock in the morning?

A. That's right.

Q. So it was the operation that set in motion that which ended in his death?

A. Fundamentally, yes.

Q. And that was for the hernia? A. Yes.

Q. If this breathing or this snoring had anything to do with it, the operation was necessarily the inciting cause was it not? A. Yes.

Q. You would not have expected him to have died from snoring or breathing or anything it produced without the operation?

A. I don't think we would.

Q. And the operation was for hernia?

A. That's right.

Q. You stated that he was operated on twice?

A. That is right.

Q. Once for a bowel obstruction?

A. That is right.

Q. The second time was for hernia?

A. Yes, sir.



(Testimony of Dr. O. F. Call.)

Q. And this was the second hernia operation?

A. That is right.

Q. If there was any clot that resulted in the embolism, it was certainly due from some of those operations?

A. I think it was from some of those.

Q. Then it was a condition within his body at the time of the last operation?

A. Yes, sir.

Q. It was what we would term a bodily infirmity?

A. That's right.

Q. If he had no bodily infirmity there could not have been an embolism?

A. That is pretty broad. There are embolisms that form without bodily infirmities.

Q. This was not such?

A. This was bodily infirmity.

Q. Whether you say it came from the operation performed on April 7, or whether it came from some other cause, it was from bodily infirmity?

A. Yes, sir.

Q. That was ultimately the cause of his death?

A. Yes, sir.

Mr. Merrill: That is all.

### Redirect Examination

By Mr. Davis:

Q. You were asked: "you would not have expected the patient to die without any operation" and you answer that "no"? [57]

A. That's right, I would not expect him to die.

(Testimony of Dr. O. F. Call.)

Q. Now, Doctor, you wouldn't and didn't expect him to die with the operation, did you?

A. No, I did not.

Q. There wasn't anything in the operation or preceding the operation that led you to think the man might die?

A. That is right, there was not.

Q. When you speak of contributing cause, you are answering that generally and not with reference to your diagnosis of this particular case or this particular death?

A. That is right.

Q. You are still of the same opinion that you were on direct examination that the cause of this man's death and the cause of this embolism was the violent, unusual and extraordinary coughing and snoring. That in your opinion was likely to cause this embolism to break loose?

Mr. Merrill: Objected to as an improper question.

The Court: He is qualified here as an expert, he may answer.

A. The cause of the death was acute embolism, pulmonary embolism which was caused by violent action to break the embolism from the thrombosis.

Q. Was there anything indicated to you at the time you operated or gave him the sedative that caused you to believe that he would develop this extraordinary condition of snoring [58] or breathing or holding his breath?

Mr. Merrill: Objected to, there is no testimony

(Testimony of Dr. O. F. Call.)

to support this type of question.

The Court: I will permit him to answer.

A. No.

Q. Doctor Call, with reference to your experience in operations, was or was not the condition that existed there or the condition that developed with reference to the snoring, choking and the stopping of breathing a most extraordinary condition?

A. It was.

Q. And was it to be expected? A. No, sir.

Q. It was not to be expected that it would develop? A. No, it was not.

Q. Was it an unforeseen occurrence?

Mr. Merrill: Objected to as repetition.

The Court: He may answer.

Q. I call your attention to the definition in Webster's International Dictionary of accident; that defines an accident as "a befalling; an event that takes place without one's foresight or expectation, an undesigned, sudden and unexpected event; chance; contingency, often an undesigned and unforeseen occurrence of an afflictive or unfortunate character, a casualty, a mishap, as, to die of accident." [59] Now, Doctor, I will ask you if the event of the patient's death under the circumstances, in your opinion, was an event that took place without foresight and expectation? A. It was.

Q. Was it undesigned, sudden and unexpected?

A. It was.

Q. Was it a chance? A. It was.

(Testimony of Dr. O. F. Call.)

Q. Due to contingency? A. It was.

Q. Was it an undesigned and unforeseen occurrence of an afflictive or unfortunate character?

A. It was.

Q. Was it a casualty? A. It was.

Q. Was it a mishap? A. It was.

Q. Did he die in your opinion, by accident?

A. He did.

Q. Now with reference to this condition, this unexpected condition that occurred there with reference to the choking and the snoring, was that an event that took place without foresight and expectation? A. That's right.

Q. Was it undesigned? A. It was. [60]

Q. Was it a chance? A. It was.

Q. A contingency? A. Yes, sir.

Q. Was it an unforeseen and undesigned occurrence of an afflictive or unfortunate character?

A. It was.

Q. And was it a mishap?

A. Yes, sir, certainly.

Q. In your opinion it was the direct cause of the man's death. The main cause, and the principal and moving cause of the man's death?

A. Yes, sir.

Mr. Merrill: Objected to as leading.

The Court: He has answered and the answer may stand.

Q. Now, Doctor Call, you testified that there was a possibility in every case that a person might die.

(Testimony of Dr. O. F. Call.)

Do you understand that possibility comes within the definition of accident?

Mr. Merrill: I object to that it is beyond the opinion or conclusion of an expert.

The Court: I would like to have the doctor reconcile this answer, or rather the answer to the question previously asked with the answer to Mr. Merrill's question. He answered Mr. Merrill's question that it was [61] a contributing cause of death.

A. We always have a contributing cause.

The Court: Regardless of any death certificate, doctor, you answered Mr. Merrill's question in which you said that the operation was the contributing cause of his death. Now, you may reconcile that answer with the answer to Mr. Davis that this was an accident within the definition given in the dictionary.

A. I think maybe I could do better if I may use an illustration?

The Court: Certainly, that is all right.

A. If you were riding in a car and the car was being driven over a road where there was a large chuck-hole unforeseen by the driver—the driver hits the chuck-hole and throws the car over and one is killed, the driving of the car is the contributing cause, just as the hernia is the contributing cause here.

Q. How would the hernia be the contributing cause?

A. Well, you might say, it takes the patient away from his normal way of living.



(Testimony of Dr. O. F. Call.)

Q. It is your opinion that the man would not have died without an operation for hernia?

A. That is right.

Q. And with reference to driving the car and hitting the chuck-hole, the snoring and breathing is that comparable to the chuck-hole? [62]

A. That's right.

Q. Then you testify that if the man had not had the hernia this choking would not have occurred and that the hernia is not the cause, or did not cause death?

Mr. Merrill: Objected to as argumentative and leading.

The Court: It is, but that is the question we are trying to get at here.

A. In putting that question to me, the answer is again, that the snoring is comparable to the chuck-hole in the road.

Q. Dr. Call, you have made answers here that would indicate, if you understood the way counsel was asking the question, that the hernia operation caused the death. Now, as I understand it, the fact that he was there—is that what you meant doctor, the fact that he was in the hospital for an operation put him in the position for the other thing to happen and that the other thing caused his death?

A. That's right.

Q. And that is your studied opinion?

A. Yes, sir.

Q. Any man in this court room may die before he gets to the foot of the stairs?

(Testimony of Dr. O. F. Call.)

Mr. Merrill: Objected to as immaterial.

Mr. Davis: This was all gone into on cross. [63]

The Court: He may answer.

A. Certainly.

Q. But it would certainly be a calamity?

A. Yes, and unexpected.

Mr. Davis: That is all, Doctor.

Recross-Examination

By Mr. Merrill:

Q. If the snoring was the chuck-hole, as you say, and the immediate cause of death was——

A. I said it was the chuck-hole that caused the embolism, the snoring was comparable to the chuck-hole in the road that caused the car to turn over.

Q. It all comes back to the operation?

A. That is comparable to the car in which he was riding.

Q. It was the commencement—the thing that set in motion everything that resulted in the death? The cause of the death?

A. The operation ould be the second thing?

Q. The operation was the contributing cause of the death?      A. Yes.

Q. And it was due to hernia?      A. Yes, sir.

Q. The hernia was the contributing cause of death?      A. That's right.

Q. There is no accidental means involved? [64]

A. We didn't expect this coughing and snoring.

Q. There was no accidental means involved?

(Testimony of Dr. O. F. Call.)

A. No external violence.

Mr. Merrill. That is all.

### Recross-Examination

By Mr. Eberle:

Q. Dr. Call, I am not clear on this. Did you reason that the snoring was the cause of the breathing of the thrombus and the cause of the embolus getting into the blood stream?

A. The violent action of the snoring broke the embolism from the thrombus, or thrombosis.

Q. If I snore I may break a thrombosis loose and cause an embolism?

A. I am testifying about this case Mr. Eberle.

Q. Just the snoring broke loose the embolus?

A. I didn't say the snoring, but the snoring and the violent action.

Q. The snoring and coughing?

A. The violent action.

Q. Did the snoring break loose the embolism?

A. I didn't so testify.

Q. But is it your testimony that the snoring and coughing did?

A. The snoring, coughing and the violent action.

Q. What would snoring have to do with the breaking loose of a thrombus in the pelvic region?

A. The snoring produced a lot of mucous in the respiratory tract that dropped into the throat; this made him struggle and the struggling would break it loose.

(Testimony of Dr. O. F. Call.)

Q. It was coughing and struggling; I thought you testified that snoring was a vibration of the palate?

A. That is what you said.

Q. What did you say?

A. It was a form of breathing associated with the vibrating of the palate.

Q. How does it differ from labored breathing?

A. It relaxes and drops down and shuts off the breath.

Q. What shuts off the breath, doctor?

A. The tongue, and the secretion dropping into the throat.

Q. That is due to the sedative given the patient?

A. No, sir, not the sedative.

Q. The relaxation of the muscles causes the tongue to drop back?

A. Yes, and the violent catching of his breath again forces it back to the normal position.

Q. The mucous and secretion that get down in the trachea due to the relaxation from the opiate?

A. Not that—it was mucous in the respiratory tract.

Q. Yes, and you clear that out—naturally you clear your throat when that gets down in the throat?

A. If you are not asleep?

Q. When you are asleep the natural tendency is to drain down? [66]

A. The tendency is the same whether he is given an opiate or not. A snorer does the same thing without an opiate.

(Testimony of Dr. O. F. Call.)

Q. In ordinary life he would do it without an opiate?      A. That's right.

Q. His action during this operation and subsequent was not different than in ordinary life?

A. That is correct.

Q. This could have happened in bed any night?

A. Or walking down the street.

Q. It was in no way due to the fact that he was in the hospital?

A. He was quite a snorer in an operation or not in an operation.

Q. His cough and snoring was no different?

A. No different except his condition was weakened by reason of his being a sick man.

Q. Then you think this happened because of his weakened condition?      A. Sure.

Q. So after all, doctor, the contributing cause was by reason of the weakened condition or bodily infirmity, by reason of his condition at that time?

A. That's right.

Q. Now, we have two bodily infirmities that he had. Thrombosis formed about four years prior when he had the original hernia operation and his condition——

A. He had another operation also. [67]

Q. But it was an operation for hernia he had some four years ago, wasn't it?

A. Yes, sir.

Q. At that time there was a bodily infirmity in the way of a thrombosis?      A. Yes, sir.



(Testimony of Dr. O. F. Call.)

Q. And it was because of his coughing that the thrombus was broken loose and went into the blood stream? A. Yes, sir.

Mr. Eberle: I think that's all.

Mr. Merrill: Nothing further.

Mr. Davis: That's all, doctor. I will call Dr. Brothers.

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### W. W. BROTHERS

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Davis:

Q. What is your profession? A. Surgeon.

Q. How long have you lived in Pocatello, doctor?

A. Since 1919.

Q. How long have you specialized in surgery?

A. I was certified as a specialist in 1926 by the American College of Surgeons. [68]

Q. You are a member of the College of Surgeons? A. Yes, sir.

Q. And have done post graduate work in surgery from time to time? A. Yes, sir.

Q. You were an officer in the first World War?

A. Yes, sir.

Q. Did you do surgery extensively then?

A. Yes, sir.

Q. You were in the last World War?

A. Yes, sir.

(Testimony of Dr. W. W. Brothers.)

Q. Your rank at discharge was what?

A. Colonel.

Q. Were you in that war in the capacity as a doctor from the commencement to the close of the war?

A. Yes, sir.

Q. Were you in charge of any Government Hospital?

A. Yes, I was.

Q. Whereabouts?

A. In charge of all medical installation at Headquarters in Algiers, AFHQ, also in charge of medical and surgical installation at Supreme Headquarters in London and Paris and Frankfort.

Q. Did you do surgery there?

A. Very little. [69]

Q. Was it done under your supervision?

A. Yes, it was.

Q. How extensive was that?

A. Most of it was referred, we didn't do a lot at headquarters.

Q. You were consulted in those matters all of the time?

A. Yes, sir.

Q. You are a graduate of a recognized medical school?

A. Yes, Northwestern University.

Q. Did you know Harry H. Wilson, personally?

A. Yes, sir.

Q. Were you at any time his family physician?

A. I took care of Harry a time or two, years ago.

Q. You were well acquainted with the family?

A. Yes, sir.

Q. You took care of his children?

(Testimony of Dr. W. W. Brothers.)

A. Yes, sir.

Q. And of Mrs. Wilson? A. Yes, sir.

Q. You were familiar with his physical condition generally? A. Yes, sir.

Q. And his general characteristics? ....

A. Yes, sir.

Q. Could you give us an estimate of how many hernia operations you have performed or assisted in performing?

A. I don't know, I haven't kept any record. I have done a [70] lot of hernias. I did over a hundred the first year in the army in World War I.

Q. Have you done six or seven hundred?

A. At least.

Q. Out of the six or seven hundred, how many post operative deaths from hernia operations by pulmonary embolism have you had? A. None.

Q. How many post operative deaths from any cause after these hernia operations have you had?

A. I have never had a hernia patient die.

Q. I assume in all operations—hernia, pelvic and abdominal operations that you have performed—I suppose you have performed a great many, probably more than a thousand? A. Yes, sir.

Q. How many post operative—in all of those operations have you had pulmonary embolism?

A. I have had one.

Q. What is your opinion as to whether post operative death following operations for hernia where the cause is pulmonary embolism is a rarity?

(Testimony of Dr. W. W. Brothers.)

A. It is very rare.

Q. Would that be unexpected? A. Yes, sir.

Q. Now, Doctor Brothers, you as a surgeon are familiar and [71] from studies you have an opinion as to when post operative deaths, following operations, are most likely to occur from embolisms?

A. How soon following operations are deaths from embolisms likely to occur?

Q. Yes. You have an opinion as to that, do you, doctor?

A. Yes, sir, it is most likely to occur from the second week following the operation to the third week. They occur at a time when the patient is thought to be practically well, or well on the road to recovery.

Q. Have you carefully studied the hospital chart and the bedside notes marked Exhibit 7 in this case?

A. Yes, sir.

Q. That is the history and record of Harry H. Wilson? A. Yes, sir.

Q. Have you read the deposition of Doctor Beeson, Doctor Swindell, Doctor Pittenger and Doctor Stewart? A. Yes, sir.

Q. Have you familiarized yourself as much as possible with the record and the testimony that is available concerning Mr. Harry H. Wilson, now deceased? A. I have.

Q. Do you have an opinion as to the cause of his death? A. I have.

Q. What is that opinion? [72]

(Testimony of Dr. W. W. Brothers.)

A. I think he died of pulmonary embolism.

Q. In your opinion, from the record, and I think you heard the testimony of Doctor Call?

A. Yes, I did hear it.

Q. From the record and that testimony was that pulmonary embolism an event that took place without foresight and expectation?

A. Yes, sir.

Q. Was it an undesigned, sudden and unexpected event?      A. Yes, sir.

Q. And was it by chance?      A. Yes, sir.

Q. Was it an undesigned and unforeseen occurrence of an afflictive and unfortunate character?

A. Yes, sir.

Q. Was it a casualty?      A. Yes, sir.

Q. Was it a mishap?      A. Yes, sir.

Q. Now, Doctor, in your study of the history of this case is there anything to indicate that this man had any profound shock after the operation, before his death?      A. No, sir.

Q. What do you say as to whether he had any shock at all?

A. According to the record there was no evidence of surgical shock. [73]

Q. Why do you say that?

A. The nurse's notes chart the patient's pulse at regular intervals and his pulse did not exceed 72 at any time after the operation.

Q. If he was suffering shock after the operation what would his pulse be?



(Testimony of Dr. W. W. Brothers.)

A. Rapid, feeble pulse. Very rapid, a hundred and over, on up to where they cannot count it.

Q. Now, Doctor Brothers, what in your opinion caused this pulmonary embolism and why do you say it was accidental?

A. The exciting cause of the pulmonary embolism in my opinion was the exertion of his unusual type of snoring and coughing that is the exciting cause. The remote cause is, of course, a thrombus. There has to be thrombosis of some foreign material to produce embolism.

Q. Anything in the blood stream that is caused to move by coughing or anything else would cause pulmonary embolism? A. Yes, sir.

Q. Is there anything in your opinion, basing it on your long experience, that would have indicated or caused a surgeon to expect this violent or extraordinary type of snoring and this exertion?

A. No.

Q. Was it unexpected? A. Yes, sir. [74]

Q. What is your opinion Doctor, as to whether pulmonary embolism—strike that please,—In your opinion is there any substantial difference in the symptomatology of pulmonary embolism and thrombus? A. Yes, sir.

Q. What is the difference?

A. They are different conditions Thrombosis may exist without symptoms, entirely without symptoms, pulmonary embolism is very dramatic, a sudden thing, and causes death in a very few minutes if it is a large embolus.

(Testimony of Dr. W. W. Brothers.)

Q. With reference to the percentage of deaths that follow hernia as post operative deaths, what is your opinion as to whether that is high or a very low percentage?

A. In my opinion it is very low. In my personal experience I never had one. I never saw any of my associates have one.

Q. You heard my question of Doctor Call from this Text Book by TeLinde?           A. Yes, sir.

Q. Is that a recognized work?

A. Yes, sir.

Q. It is prepared by a Doctor who was taking his record, or making his record from the results at Johns Hopkins and Mayo Clinics?

A. Yes, sir.

Q. Now, Doctor, I call your attention to a statement on [75] 87 as follows: "Pulmonary embolism is one of the most dramatic and tragic accidents that occur in surgery." Do you agree with that?

A. Yes, I do.

Q. The accident may occur in surgery without being the result, let me put it this way. The accident may occur in surgery without surgery being the cause of the accident?

A. Yes sir, that is right.

Q. Referring to post operative deaths. The accident after surgery doesn't mean that surgery is the exciting cause of that death, or that surgery caused the death at all?           A. No, sir.

Q. There can be accidents in surgery?

(Testimony of Dr. W. W. Brothers.)

A. (By Mr. Merrill): We object to that as argumentative, leading and suggestive.

The Court: The rule is that a pretty broad scope is allowed where you are examining an expert as this witness is. You may continue with the question.

Q. There is an occasional accident in surgery the same as there may be an accident in anything else? A. Yes, sir.

Q. The accident would not have to be caused by the surgery at all, would it Doctor?

A. No, sir. [76]

Mr. Merrill: Move to strike the answer for an objection.

The Court: It may be stricken for the purpose of the objection.

Mr. Merrill: Objected to as leading.

The Court: Overruled, the answer may be reinstated.

Q. That, as I understand it, in your opinion, is what happened. There was an accident not connected with the surgery? A. That's right.

Q. It is your opinion that surgery was not the contributing cause to the pulmonary embolism at all?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. That is right.

Q. (By The Court): I think that question was a bit leading Mr. Merrill, but this is an expert and

(Testimony of Dr. W. W. Brothers.)

it is tried before the Court. The answer may stand.

Mr. Davis: That is all Doctor.

The Court: We will recess for ten minutes.

3:45 P.M. March 17, 1948

Mr. Davis: I wonder if I may ask another question or two.

The Court: Yes, you may.

Q. It was your opinion based on the facts produced here which [77] facts are available to you in this matter,—May that be stricken please,—

Q. Doctor Brothers, will you give us your opinion based upon the facts as produced here, which are available to you in this matter, as to whether or not this death would have been likely to occur under the same conditions, of extra-ordinary snoring and coughing, regardless of whether the operation had been performed or not?

Mr. Merrill: Objected to as not proper, there is no foundation and it calls for a conclusion and therefore it is incompetent.

The Court: He may answer.

A. Yes sir, I think he probably would have died just the same whether he would have been operated on at all.

Q. In your opinion it would have been an accident as it has been defined here? A. Yes, sir.

Mr. Davis: That is all, you may examine.

(Testimony of Dr. W. W. Brothers.)

Cross-Examination

By Mr. Eberle:

Q. With reference to the testimony as to an accident. Is death an accident?

A. It is not so defined, always.

Q. In your opinion is death an accident?

A. Sometimes. [78]

Q. Is it an accident when it is dramatic?

A. That is part of the definition of accident, a dramatic occurrence.

Q. Not every dramatic death is an accident, is that correct?      A. I would not think so.

Q. Suppose that Mr. Wilson went home to dinner and sat down, cleared his throat and had an embolism and died, would that be an accident?

A. I think so.

Q. If a person dies while sitting in a chair, of embolism, is that an accident?      A. I think so.

Q. Is post-operative pneumonia an accident?

A. Not ordinarily, no.

Q. Is post-operative shock an accident?

A. I don't think so.

Q. It would be dramatic?      A. Yes, sir.

Q. It would be sudden?

A. Not as sudden as embolism.

Q. Pretty sudden?

A. Rather a short time.

Q. Would it be undesigned?

A. Without design, I think so.

Q. But still not an accident?



(Testimony of Dr. W. W. Brothers.)

A. No. [79]

Q. Would it be expected?

A. You would have more warning, depending on the type of operation, you might expect shock.

Q. What percentage of post operative deaths are due to shock?      A. I don't know.

Q. Is it rare?      A. Rather rare.

Q. It is rather rare if you die from post-operative shock and if you die from pulmonary embolism?      A. Yes, sir.

Q. What is the distinction?

A. Well, embolism is the breaking off of a clot which is caused by unusual exertion. The breaking off of this clot causes the fragment or broken portion to float through the blood stream; that happens as the result of unusual exertion. Exertion is the exciting cause.

Q. If I walk down the street and create an embolism and I die, that is an accident?

A. Yes, sir.

Q. That is your opinion of an accident?

A. Yes, sir.

Q. Is that expected Doctor?      A. No, sir.

Q. And shock is not expected?

A. You might expect shock if you had a severe blood loss [80] or a severe operation.

Q. In as much as recent years have produced penicillin and other drugs, what is the greatest single factor that a surgeon has to face with regard to post-operative deaths?

(Testimony of Dr. W. W. Brothers.)

A. I think shock is one of the greatest.

Q. Not embolism?

A. It does not occur to me that it is that common.

Q. Do you belong to the American College of Surgeons?      A. Yes, sir.

Q. And would you report that as a rare case to the College of American Surgeons?

A. No, there have been lots of reports.

Q. You would not report it as unusual?

A. I think of it as unusual.

Q. I didn't ask that.

A. No, I wouldn't report it because many have been reported.

Q. You said that in your opinion the cause of death was pulmonary embolism. What records did you use?      A. The hospital records.

Q. From the hospital record introduced in evidence here as exhibit 7 you concluded from that record that the man died from pulmonary embolism?      A. That is right.

Mr. Davis: That is not a question.

The Court: Perhaps not, but the witness answered. It may stand. [81]

Q. Referring to the pulmonary embolism, did you rely on this hospital record?

A. I think there is enough in the record to indicate that it was pulmonary embolism.

Q. You based your opinion on that?

A. Largely.

(Testimony of Dr. W. W. Brothers.)

Q. What are the symptoms of pulmonary embolism?

A. It has very few preliminary symptoms. They die within two to fifteen minutes from the onset of the embolus. They die very suddenly. They have very few symptoms, some pain in the chest. They may cough and suddenly stop breathing.

Q. It is the stopping of respiration and pain in the chest? A. Yes, there is that.

Q. Is there any indication of pain in that record in the last hour or two?

A. There is no mention of pain.

Q. Did you hear Doctor Call testify that he was familiar with the snoring and breathing condition of Mr. Wilson? A. Yes, sir.

Q. I think you said that the condition of his bodily infirmity with reference to the snoring and coughing was the exciting cause of the embolism?

A. Yes, sir.

Q. Why did you say it was unexpected if Doctor Call knew in advance that he had this coughing?

A. The Doctor didn't know he had the thrombus.

Q. Why was it unexpected if he knew of the bodily infirmity with reference to the snoring and so forth?

A. If you consider that the exciting cause, he still has to have the thrombus.

Q. Did you hear Doctor Call say he knew he had several operations for hernia prior to this operation? A. I understood he had one.

(Testimony of Dr. W. W. Brothers.)

Q. Does a surgeon know, where there has been an operation, does a surgeon know there might well be thrombosis?

A. Yes, he might think there might be thrombosis, however it might be present without symptoms.

Q. Even if there had been a herniorrhaphy or a herniotomy; you might anticipate there was a thrombus, isn't that right?

A. I don't think so.

Q. You don't think so, what word would you use instead of anticipate?

A. In the absence of symptoms you would not anticipate nor expect a thrombosis.

Q. A surgeon knows where there has been surgical procedure there is a possibility of thrombosis existing?

A. Yes, sir, there is a possibility.

Q. You rather use the word possibility?

A. Yes, that is the word to use.

Q. It is a hazard in every surgical procedure?

A. Yes, sir.

Q. It is a hazard where a surgeon operates the second time?

A. Yes, sir.

Q. He knows of the existence of the hazard?

A. Yes, sir.

Q. Not only did Doctor Call know of the existence of the hazard by reason of the first surgery but also he knew of the snoring and breathing proclivities of this person. He knew of that hazard?

A. I suppose that is true.

(Testimony of Dr. W. W. Brothers.)

Q. Generally, where there is a thrombus from which portions may be broken, quite often the amount of coughing is immaterial, isn't that true?

A. Immaterial in what way.

Q. A rather light cough might break the thrombus loose in one instance, or a heavy cough in another?

A. Yes sir, that is true.

Q. It doesn't always take a heavy cough?

A. It would be more apt to break.

Q. Even though he had a comparatively light cough it might have broken off the embolus?

A. It is possible.

Q. Speaking of accidents again. In your opinion where an operation is skillfully performed and the man dies, is that an accident? [84]

A. It would depend on what caused his death.

Q. You have heard the statement "the operation was a success but the patient died." In this instance where the surgical procedure was proper and no infection occurred and the man dies, is that an accident?

A. If he dies of pulmonary embolism, I would say yes.

Q. Why do you say that is an accident?

A. It is so definitely an accident. It is an unforeseeable, unexpected and tragic death.

Q. Is there any other tragic cause of death?

A. Gunshot wound.

Q. Post operative deaths?

A. I don't think you have any like pulmonary embolism.



(Testimony of Dr. W. W. Brothers.)

Q. Is death by coronary occlusion sudden?

A. Yes, it is sudden.

Q. Is it dramatic? A. Yes, sir.

Q. Is it undesigned?

A. Yes, sir—well, there is a cause for coronary occlusion.

Q. Is it an accident?

A. I would not say so, no I wouldn't think it is an accident excepting when an embolus is concerned, and that is thrombosis.

Q. You think coronary thrombosis is an accident? A. No.

Q. It is dramatic? [85] A. Yes, sir.

Q. Sudden? A. Yes, sir.

Q. Undesigned? A. Yes, sir.

Q. Unexpected?

A. You might expect it if you had a cardiogram.

Q. If the cardiogram showed no pathology—that is possible isn't it Doctor?

A. Yes, it is possible.

Q. Would that be an accident?

A. No, I don't think so.

Q. So thrombosis plugging an artery of the heart with a clot is not an accident, but an embolus coming from the venous system and plugging of a vein of the lung is an accident? A. Yes, sir.

Q. Is a surgeon aware of the danger of an embolism or shock every time he operates?

A. Yes, sir, he is always aware of it.

(Testimony of Dr. W. W. Brothers.)

Q. In every operation?

A. Yes, sir, he is always aware of danger.

Q. You never know whether in a particular case there may be an occlusion or thrombosis—those are dangers that may be present?

A. Yes, but they don't concern you very much because they are very rare. [86]

Q. So rare that you would report it to the American Medical Association if you found one?

A. No, sir.

Q. Have you made any study of the percentage of post operative deaths due to hernia operations?

A. Not hernia alone.

Q. Do you know whether in preparing statistics at Mayo's they have come to the conclusion that there are five times as many pulmonary embolisms following hernia operations as there are in operations for appendicitis?

A. Yes, I know that is a statement they put out.

Q. Where there is a psychological poison due to changes in bodily functions brought about by anesthetic, would you consider that an accident?

A. Psychological.

Q. Yes.

A. I don't understand that, I would rather think you mean pathological.

Q. Would you think that would be accidental?

A. Yes, I would think so.

Q. From the anesthetic?

A. That would not be the normal result.

(Testimony of Dr. W. W. Brothers.)

Q. Doctor, you say in this case the accident was not connected with the surgery?

A. In my opinion it was not.

Q. Do you rule out the embolus from the lower extremities? [87]

A. Most likely place would be in the pelvic veins.

Q. Ordinarily emboli originates in the lower extremities?

A. Most commonly in the illiac and larger veins of the leg and prostate.

Q. There is no reason that it would not originate in there in this case?

A. Except that the original hernia operation might have left a thrombosis.

Q. Yes, except that the original hernia operation may have left a thrombosis?

A. That is right.

Q. As between the two it is pure speculation?

A. That's right, yes, sir.

Q. You stated that you base your opinion upon the theory that the embolus could not be coming from ligation or manipulation because of the short time?

A. That is extremely rare.

Q. But there are cases that arise in that short time.

A. That is extremely rare.

Q. But it is possible?

A. That's right, it is possible.

Q. Does so called snoring increase the secretion that would go down the trachea or does it reduce it?

(Testimony of Dr. W. W. Brothers.)

A. There is somewhat of an irritation by this flapping of the soft palate that might increase the secretion. [88]

Q. It is good procedure to require and to cause the patient to cough up that phlegm?

A. Yes, sir.

Q. Opiates and sedatives are proper procedure?

A. Yes, sir.

Q. They relax an individual, some more and some less?

A. Yes, sir.

Q. It is not uncommon that a person may be relaxed a great deal?

A. That's right.

Q. The jaw muscles of persons relax and the mouth might drop?

A. Might drop open.

Q. And he may be so relaxed that those muscles don't operate?

A. Yes, sir.

Q. As a result of the opiate—strike that—as a result of the relaxation following an opiate and the flowing of this secretion from the relaxation, it is proper procedure to require coughing to bring up the secretion?

A. That's right.

Q. That cough might be light or heavy?

A. Yes.

Q. It might be light or heavy and still bring on an embolism?

A. Yes, sir.

Mr. Eberle: That is all Doctor.

#### Cross-Examination

By Mr. Merrill: [89]

Q. You say that it is extremely rare but possible that pulmonary embolism may come from an

(Testimony of Dr. W. W. Brothers.)

operation within a period of twenty hours, that is the effect of your testimony?      A. Yes, sir.

Q. So it was possible that this pulmonary embolism may have come from this operation?

A. Possible but not probable.

Q. What, aside from the time in the record that would cause you to conclude that it was not probable?      A. Just the time element.

Q. That is all?      A. Yes, sir.

Q. You admit that the time element is long enough for a possible embolism from the operation?

A. Yes, I admit it is possible but not probable.

Q. So therefore you are basing your opinion on probabilities and possibilities rather than any specific facts?

A. I am basing my opinion on the most likely thing that happened.

Q. But you do and you must admit that it is possible that the embolism was the result of the hernia operation, if it was an embolism?

A. I don't think it was due to the hernia operation.

Q. There is a possibility?

A. A bare possibility.

Q. It does occur in that period of time?

A. Very rarely. [90]

Q. You have nothing except your own opinion and the element of time that causes you to conclude that?      A. That is right.

Q. You speak of embolism caused by thrombosis, now, what causes the thrombus?



(Testimony of Dr. W. W. Brothers.)

A. It is caused by different things; prior surgery; injuries; infection of the vessel walls; foreign material in the blood stream; endocarditis.

Q. And everyone of those go back to a bodily infirmity.

A. Injuries and prior operations, you would not call them diseases.

Q. But it is a bodily infirmity?

A. Yes, it is.

Q. The fact that this man had been operated on twice before, that would create a probability for the thrombosis?

A. Yes, sir, I think he had some damage to the circulatory system in the abdomen.

Q. If he had not been operated before you know of nothing that could have created thrombosis in Harry Wilson?

A. Yes, it might occur at anytime from slowness of the blood flowing. He might have thrombosis and not know it.

Q. It would be due to a bodily infirmity?

A. It might be due to the slowness of the blood stream; it would clot.

Q. It would be a bodily infirmity, a strong healthy man would [91] not have thrombosis?

A. Yes, he might.

Q. It would be due to bodily infirmity?

A. If you call stasis an infirmity.

Q. Have you any theory upon which you can base your conclusion as to the origin of this thrombosis?      A. I don't know where it was.

(Testimony of Dr. W. W. Brothers.)

Q. You cannot say that it wasn't connected with this operation? A. I don't think it was.

Q. You have no way of saying that?

A. Yes, this thing occurred too soon following this surgery to have been caused by it.

Q. The element of time is the only thing you have to conclude that? A. Yes, sir.

Q. The thrombosis may have been due to a preceding operation? A. That's right.

Q. You have no means of saying it was?

A. No, sir.

Q. The preceding operation was for hernia?

A. Yes, I understand so.

Q. So hernia may have contributed to this embolus?

A. I think it was the abdominal operation.

Q. It was a hernia operation that preceded this one?

A. It is very apt to occur where you have the operation for the internal obstruction. [92]

Q. Have you examined the record of this operation? A. No, sir.

Q. You have nothing upon which to base your conclusion? It is simply a guess?

A. Nothing only I know he was operated.

Q. Do you mean to say Doctor, that in your opinion Harry Wilson would have died at five o'clock in the morning April 8, 1947 whether there had been any operation or not?

A. He might have.

(Testimony of Dr. W. W. Brothers.)

Q. Is it your opinion that he would?

A. I think he would.

Q. From what do you think he would have died?

A. Embolism.

Q. What would have caused it?

A. Thrombosis.

Q. When did he have thrombosis?

A. I think he had it before this operation.

Q. What evidence do you have for that conclusion?

A. I don't have any except this record.

Mr. Merrill: That is all.

### Redirect Examination

By Mr. Davis:

Q. Counsel examined you about post operative deaths, and in his examination indicated that hernia post-operative deaths were not rare and asked you about a statement [93] concerning Mayo's to the effect that there was five time more post-operative deaths following hernia operations than there was following something else. Now, Doctor, would that determine anything unless you know the number of hernia operations?

A. No.

Q. What is the ratio between operations for hernia and appendicitis, is hernia more common?

A. I can't answer that now.

Q. Do you know how many millions of hernia operations are performed?

A. That depends on the type of operation.

Q. And the question of rarity of death follow-

(Testimony of Dr. W. W. Brothers.)

ing those operations would depend, not upon the percentage of some other disease but on the number of hernia cases as a total and the number of deaths, and that would determine the total would it not, that is, it would determine the total percentage?

A. Yes, sir.

Mr. Davis: That is all.

### Recross Examination

By Mr. Eberle:

Q. Post operative pulmonary embolism is more likely to occur in older than in younger aged persons? A. That is right. [94]

Q. You knew that Mr. Wilson was sixty-one?

A. Yes, sir.

Q. He would be more predisposed to it than a man thirty or forty?

A. Yes, sir.

Q. The reason that post operative embolisms are more in hernia cases than in appendectomy cases is because appendectomy occurs earlier in life?

A. That is true.

Mr. Eberle: That is all, Doctor.

Mr. Davis: May the Doctor be excused from further attendance?

The Court: Unless counsel wants him to stay I think the Doctor should be allowed to go.

WALTER M. JONES

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Where do you live, Mr. Jones?

A. Salt Lake City, Utah.

Q. What is your business?

A. Branch manager for the Business Men's Assurance Company for the branch serving the states of Utah and part of Idaho.

Q. And Pocatello is in your jurisdiction? [95]

A. Yes, sir.

Q. Did you know Mr. Wilson personally?

A. I did not.

Q. You knew he had a policy with your company?

A. Only after his death.

Q. He had only one policy with your company?

A. Yes, as far as I know, that is correct.

Q. You came here in this case as branch manager to represent the Business Men's Assurance Company?

Mr. Merrill: That is objected to as immaterial.

The Court: He may answer.

A. Yes, sir.

Q. Now, Mr. Jones, did you bring with you the records of your company showing the payments of premiums by Mr. Wilson?

A. I did not.

Q. You knew before you came here that the company denied that his premium had been paid?

Mr. Merrill: Objected to as immaterial.



(Testimony of Walter M. Jones.)

The Court: He may answer.

A. I did know.

Q. Where were the premiums paid, to the Salt Lake City Office or the Kansas City Office?

A. Of recent years to the Salt Lake City Office.

Q. Did you examine the records of the company to see when the payments were made, before you came up here? [98]

A. I did not.

Q. Do you have any knowledge with reference to whether Mr. Wilson paid his premium?

Mr. Merrill: Objected to as immaterial. If they paid it they should prove it.

The Court: I take it that is what he is trying to do now. He may answer.

A. I do not.

Q. I think you stated that there was no record of his having paid his premium?

A. I don't recall such a statement.

Q. Have you made such a statement to your counsel?

A. I think not.

Q. Was Mr. Wilson's policy in force in April 8, 1947?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I do not know.

Q. How long have you been in Salt Lake City?

A. Since 1923.

Q. You have no recollection of his premiums having been paid there?

(Testimony of Walter M. Jones.)

A. I do not, certainly not.

Q. What time—strike that—you can tell by looking at the policy when the premiums were payable?

A. Yes, sir. [97]

Q. When were they payable; first, Mr. Jones, do you need to look at the policy to say whether you know or not?

A. Yes, sir.

Q. Do you know what that is?

A. Yes, sir.

Q. What is it?

A. Policy of Accident and Health Insurance.

Q. In whose favor?

A. The insured's name is stated as Harry H. Wilson.

Q. By whom was it issued?

A. Business Men's Assurance Company of America.

Q. Can you tell whether this is the policy that is sued on here?

A. I cannot unless the number of the policy in the complaint is stated.

Mr. Davis: I offer the policy in evidence.

The Court: Any objection.

Mr. Merrill: None.

The Court: It may be admitted.

Q. Now, Mr. Jones, handing you exhibit 11, will you please advise us as to when the last premium on that policy, preceding April 8, 1947, would have been due?

A. There are three methods of paying the premiums——

(Testimony of Walter M. Jones.)

Q. When would the last premium, prior to April 8, 1947, have been due in order to keep the policy in force? [98]

A. There are three methods of paying the premium, quarterly, semi-annually, and annually. The anniversary date is December 1, that would be prior to April 7—December 1, 1946.

Q. Now, if the premium was paid and accepted by the Company about December 31, would the policy have been in force on April 8, 1947?

A. If paid semi-annually or annually.

Q. If either annual or semi-annual premiums was paid by Mr. Wilson or anyone on his behalf any time after December 1, 1946, the policy would have been in force at the time of Mr. Wilson's death?

Mr. Merrill: Objected to as not full enough. It doesn't give the amount.

The Court: I take it he means the amount of the annual or semi-annual premium. The witness mentioned the quarterly, semi-annual and annual premium, and the question specifically mentioned annual and semi-annual premium. I don't get the ground of your objection.

Mr. Merrill: I don't see how the witness can answer unless he knows the amount they are asking about.

The Court: Well, we will find out. He may answer. [99]

A. To answer that, so far as I am concerned, would require a qualifying statement.

The Court: You may do that.

(Testimony of Walter M. Jones.)

A. If this policy was continuously in force from the date of issue up to December 1, 1946, then the due date or anniversary date, December 1, 1946, would require a payment of \$31.00 or \$15.90 to continue it in force up to and beyond the date of death.

Q. If the premium was accepted by your Company or your office at any time before his death; if it was accepted, that is, \$15.90 or \$31.00 any time after December 1, 1946, under the terms of the policy then it would be in full force and effect?

A. If it had not previously lapsed.

Q. Doesn't the policy provide that, if it lapsed and if you accept the premium afterward it cures the lapsed condition?

A. If the Company receives it that is true.

Q. Look at exhibit numbered 12 and see if you know what it is? See if you recognize the endorsement on the back of it?

A. Yes, sir, I do.

Q. What is it? A. A check for \$31.00.

Q. Made payable to whom?

A. Business Mens Assurance Company.

Q. And endorsed by your Company?

A. Yes, sir. [100]

Q. In Salt Lake City, Utah? A. Yes, sir.

Q. And cashed?

A. Apparently so—deposited to account, but it is dated 2/25/47.

Mr. Davis: I offer this exhibit in evidence.

Mr. Merrill: May I ask a question on this.

The Court: Yes, you may.

By Mr. Merrill:

(Testimony of Walter M. Jones.)

Q. What effect does the date 2/25/47 have?

A. The premium due December 1, 1946, lapsed December 31, 1946, unless it was paid by that time. That is the usual procedure.

Q. So the policy would have been lapsed at the time this was sent?

A. Yes.

Mr. Merrill: We object to the introduction of this as being immaterial.

The Court: It may be admitted subject to your objection.

Q. Now, Mr. Jones, that check was sent you for payment of the premium on the policy on Harry H. Wilson?

A. Yes, sir.

Q. And it is stamped and marked on the back, premium payment or premium account. "For deposit only, Business Mens Assurance Company, premium account."?

A. That's right.

Q. Mr. Wilson had only one premium account?

A. Yes, sir.

Q. "Deposit only" means if it comes back, then, that man doesn't get credit, and that check was cashed and placed to the credit of the Business Mens Assurance Company?

A. Undoubtedly.

Q. You kept the money as payment of the premium?

A. Yes, it was accepted, and he would have to furnish evidence of insurability necessary to reinstate the policy.

Q. You accepted the check and cashed it and didn't notify him of any lapse of the policy?



(Testimony of Walter M. Jones.)

A. I cannot say.

Q. Why did you accept the check?

A. It is the usual procedure to do that.

Q. Did he ever receive any notice of the lapse or forfeiture of the policy?

A. I don't know of anything.

Q. It never went from your office?

A. We don't send out that notice, it is from the home office.

Q. If the policy is lapsed is it the practice to notify the policy holder to that effect?

A. I cannot say. I assume that is the practice.

Mr. Davis: That is all.

#### Cross-Examination

By Mr. Merrill: [102]

Q. Did you have anything to do with notifying policyholders of lapsed policies?

A. Nothing at all.

Q. The only thing you could do was to accept this check and the records would show what it was for at Kansas City?

A. That's right.

Q. They would look after it from that time on?

A. Yes, sir.

Q. The date of the check would indicate that the policy was lapsed?

A. Yes, sir.

Q. Lapsed from December 31, 1946?

A. Yes, sir.

Q. And the check is dated February 25, 1947?

A. It was tendered to us twenty-five days after the Grace period had expired.

(Testimony of Walter M. Jones.)

Q. Wouldn't it be a month and twenty-five days?

A. Yes, sir, it would.

Q. After the grace period had expired?

A. That is right.

Q. Look at the last page of the policy and see who countersigned it, Mr. Jones?

A. P. F. Koonse, registrar.

Q. Do you know where he lives?

A. Kansas City, I assume. [103]

Q. He is not with you?

A. Not a representative in the Salt Lake City office.

Q. The general office of the Company is in Kansas City? A. That is right.

Q. And he is the registrar there?

A. Yes, sir.

Mr. Merrill: That is all.

Mr. Eberle: No cross.

### Redirect Examination

By Mr. Davis:

Q. You had been accepting these premiums before this time?

A. If I may explain, the Salt Lake City, Utah, office is a sales office and we accept some seventeen hundred payments a month. I never see any of them; they are sent in by mail and brought in by some individuals; they are accepted for deposit and payment of premiums just as this. The individuals in the office don't know whether the policy has lapsed or not when they accept the check.

(Testimony of Walter M. Jones.)

Q. Ever since you have been the branch manager people in Pocatello and this community have paid their premium in Salt Lake City, Utah?

A. Only the last eight years we have collected them.

Q. For the last eight years Mr. Wilson was authorized to pay his premium at Salt Lake City, Utah?

A. Yes, sir. [104]

Q. Every premium he paid, you cashed the check and sent it to Kansas City?

A. We deposited it at Walker Brothers Bank.

Q. What becomes of the money paid for premiums, is it credited to the man's account as payment?

A. I presume so.

Q. Kansas City office knows what policies are paid on,—what policies are covered by certain premiums?

A. Yes, undoubtedly.

Mr. Davis: With reference to plaintiff's exhibits 1 to 6. Those consist,—the first four of original letters between the Company and myself. I have produced the original letters they wrote me and they have produced my original letters to them. I want to offer plaintiff's exhibit 1 as a letter from my office to the Business Mens Assurance Company Kansas City, concerning this policy, advising them of Mr. Wilson's death by accident.

Mr. Merrill: No objection.

The Court: Admitted.

(Testimony of Walter M. Jones.)

PLAINTIFF'S EXHIBIT No. 1

[Letterhead]

B. W. DAVIS  
Attorney at law  
Ross-Davis Bldg.  
Pocatello, Idaho

April 21, 1947

Business Men's Assurance Co. of America,  
Kansas City, Mo.

In re: Harry H. Wilson—Policy 745330—Pocatello, Idaho.

Gentlemen:

This is to advise you of Mr. Wilson's death by accident from a pulmonary embolism.

Yours very truly,  
/s/ B. W. DAVIS

D/G

Received April 23, 1947.

Admitted March 17, 1948.

(Testimony of Walter M. Jones.)

Mr. Davis: It reads: "April 21, 1947, Business Mens Assurance Company of America, Kansas City, Missouri. In re: Harry Wilson—Policy 745 330 Pocatello, Idaho.

Gentlemen: This is to advise you of Mr. Wilson's death by accident from a pulmonary embolism. Yours [105] very truly, B. W. Davis.

Now, we offer in evidence plaintiff's exhibit 2 which is a letter under date of May 2, written by the Business Men's Assurance Company of America in reply to that letter, to me.

The Court: It may be admitted.

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PLAINTIFF'S EXHIBIT No. 2

[Letterhead]

Business Men's Assurance Company  
of America

215 Pershing Road . Kansas City 10, Missouri

May 2, 1947

Mr. B. W. Davis, Attorney,  
Ross-Davis Bldg.  
Pocatello, Idaho.

Harry H. Wilson, Deceased Pocatello, Idaho  
D-1735.

We are sorry to learn from your letter of the death of Mr. Wilson, and through you we extend to Mrs. Wilson and other members of the family our sincere sympathy in their sorrow.



(Testimony of Walter M. Jones.)

Enclosed are blanks to be used in giving proof of claim under policy 745330.

In furnishing these blanks, this Company does not waive any of the terms or provisions of the policy or any forfeiture that may have accrued to the Company thereunder.

/s/ E. F. SMITH,  
Chief Supervisor.

EFS:MD

C-51-2

C-50-2

C-53-1

C-52-2

Ret. Env.

Admitted Mar. 17, 1948.

Mr. Davis: It is on the letterhead of the Business Men's Assurance Company, and reads:

May 2, 1947. Mr. B. W. Davis, Attorney, Ross-Davis Bldg., Pocatello, Idaho.

Harry H. Wilson deceased, Pocatello, Idaho, D. 1735.

We are sorry to learn from your letter of the death of Mr. Wilson, and through you we extend to Mrs. Wilson and other members of the family our sincere sympathy in their sorrow.

Enclosed are blanks to be used in giving us proof of claim under policy 745330.

In furnishing these blanks, this Company does not waive any of the terms or provisions of the

(Testimony of Walter M. Jones.)

policy or any forfeiture that may have accrued to the Company thereunder. E. F. Smith, Chief Supervisor." with a notation "C-51-2; C-50-2; C-53-1; C-52-2.

Now, I would like to offer exhibit 3, that is a letter from my office to the Insurance Company.

The Court: Any objection? [106]

Mr. Merrill: None.

The Court: It may be admitted.

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PLAINTIFF'S EXHIBIT No. 3

[Letterhead]

B. W. DAVIS

Attorney at law

Ross-Davis Bldg.

Pocatello, Idaho

Business Men's Assurance Co. of America,  
215 Pershing Road,  
Kansas City 10, Mo.

Re: Harry H. Wilson, deceased, Pocatello,  
Idaho. D-1735

July 9, 1947.

Gentlemen:

Enclosed herewith is Mrs. Wilson's sworn statement and the statement of the undertaker. Mr. Wilson died of Pulmonary Embolism, which Mrs. Wilson understands to come within the terms of the Policy by reason of the decisions of the Su-

(Testimony of Walter M. Jones.)

preme Court of this State and the fact that this Embolism was an accident.

She has not answered you sooner because of the fact that she has been ill and not in condition to consider the matter.

Will you please furnish me with copies of the forms that are herewith enclosed so that we may have a record. You have not sent these forms in duplicate so that Mrs. Wilson could have exact copies.

Yours very truly,

/s/ B. W. DAVIS

D/g

Encls.

Received July 14, 1947.

Admitted Mar. 17, 1948.

Mr. Davis: It reads: "July 9, 1947. Business Men's Assurance Company of America. 215 Pershing Road Kansas City 10, Missouri. Re: Harry H. Wilson, deceased, Pocatello, Idaho, D. 1735.

Gentlemen,—Enclosed herewith is Mrs. Wilson's sworn statement and the statement of the undertaker. Mr. Wilson died of Pulmonary Embolism, which Mrs. Wilson understands to come within the terms of the policy by reason of the decisions of the Supreme Court of this State and the fact that this Embolism was an accident.

She has not answered you sooner because of the

(Testimony of Walter M. Jones.)

fact that she has been ill and not in condition to consider the matter.

Will you please furnish me with copies of the forms that are herewith enclosed so that we may have a record. You have not sent these forms in duplicate so that Mrs. Wilson could have exact copies. Yours very truly, B. W. Davis."

Mr. Merrill: It may be admitted I presume that the statement of what the writer thinks is the law is not an admission on our part.

The Court: The Court understands that.

Mr. Davis: I am now offering in evidence [107] exhibit 4 which is a letter in reply to the letter I wrote to the Company and which I have read.

Mr. Merrill: No objection.

The Court: Admitted.

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PLAINTIFF'S EXHIBIT No. 4

[Letterhead] Business Men's Assurance Company of America.

July 18, 1947.

Mr. B. W. Davis  
Attorney at Law  
Ross-Davis Bldg.  
Pocatello, Idaho

Harry H. Wilson, deceased, 553 S. Sixth, Pocatello, Idaho, D-1735.

This will acknowledge your letter of July 9 containing incomplete reports relative to Mr. Wilson's death which occurred April 8, 1947.

(Testimony of Walter M. Jones.)

After considering the facts contained in these reports I have been instructed to inform you that we will be unable to recognize Mrs. Wilson's application for the payment of the Accidental Death Benefit.

Among the reasons for this decision are the following:

1. Under the general provisions of the policy is specifically stated that the accident insurance under the policy covers all bodily injuries fatal or otherwise subject to the provisions, conditions, limitations specified in the policy except those caused wholly or partly as a result which are contributed to by bodily or mental infirmities, hernia, ptomaine, bacterial infections, or by any disease or medical surgical treatment therefore, such as hernia, ptomaine, bacterial infection, disease or medical surgical treatments to be construed as sickness.

2. No satisfactory proof has been submitted to the effect that Mr. Wilson's death was effected solely through accidental means.

3. That no affirmative proof of loss was furnished the Company within 90 days as required by the standard provisions of the policy.

Yours very sincerely,

/s/ E. F. SMITH,

Chief Supervisor.

EFS:HD

SLC.

Admitted Mar. 17, 1948.



(Testimony of Walter M. Jones.)

Mr. Davis: That letter is as follows: "July 18, 1947. Mr. B. W. Davis, Attorney at Law, Ross Davis Bldg., Pocatello, Idaho. Harry H. Wilson, deceased, 553 S. Sixth, Pocatello, Idaho. D1735.

This will acknowledge your letter of July 9, containing incomplete reports relative to Mr. Wilson's death which occurred April 8, 1947.

After considering the facts contained in these reports I have been instructed to inform you that we will be unable to recognize Mrs. Wilson's application for the payment of the accidental death benefit.

Among the reasons for this decision are the following:

1. Under the general provisions of the policy is specifically stated that the accident insurance under the policy covers all bodily injuries fatal or otherwise subject to the provisions, conditions, limitations specified in the policy except those caused wholly or partly as a result which are contributed to by bodily or mental infirmities, hernia, ptomaine, bacterial infections, or by any disease or medical surgical treatment therefore, such as hernia, ptomaine, bacterial infection, disease or medical surgical treatments to be construed as sickness.

2. No satisfactory proof has been submitted to the effect that Mr. Wilson's death was effected solely through accidental means.

3. That no affirmative proof of loss was furnished the Company within 90 days as required by

(Testimony of Walter M. Jones.)

the standard provisions of the policy. Yours very sincerely, E. F. Smith, Chief Supervisor."

Mr. Davis: Now, we offer in evidence plaintiff's exhibit 5, a statement by Mrs. Wilson, to the Company, as worn statement.

Mr. Merrill: No objection.

The Court: Admitted.

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### PLAINTIFF'S EXHIBIT No. 5

1

#### Beneficiary's Statement

Business Men's Assurance Company of America,  
Kansas City, Mo.

I, Cecelia J. Wilson, am the beneficiary named in Policy No. . . . ., of the Business Men's Assurance Company of America, and I hereby apply for the sum of \$. . . . . under the terms of said policy, and in support of this application I state the following facts:

1. Full name of deceased Harry H. Wilson.
2. Residence at the time of receiving injuries Pocatello, Idaho.
3. What was the date of birth of the deceased? March 15, 1886. Height? 5' 7". Weight? 155.
4. (a) When did he die? At about five o'clock a.m. on the 8th day of April, 1947. (b) Where did he die? St. Anthony Hospital, Pocatello, Idaho.

(Testimony of Walter M. Jones.)

5. What bodily injuries were received which it is claimed caused his death, and what external and visible marks of such injuries were found on the body of the deceased? (Give full particulars) He died of pulmonary embolism.

7. (a) What was deceased's occupation at the time of receiving the injuries? (If more than one, give all) Merchant. (b) By whom was he employed? Member of the partnership of Fargo-Wilson-Wells. (c) State all duties he performed in connection with such occupation Buyer & Manager.

8. Was he partially disabled by said injuries? No.

10. In what hospital, if any, was he confined? Name St. Anthony Hospital. Address, Pocatello, Idaho. From April 6, 1947, to Apr. 8, 1947.

11. State in detail what he did after he was injured. (This question requires an explicit answer) Died instantly.

12. Give names and addresses, in the order in which they were consulted, of all physicians and surgeons who attended or saw the insured after the injuries were received, with the dates of all such consultations and attendance Dr. O. F. Call, Pocatello, Idaho.

15. Was an inquest held? No.

16. Was an autopsy held? No.

17. (a) Had deceased received any prior injury? No. (b) Was deceased sick from any cause within

(Testimony of Walter M. Jones.)

five years preceding his last injury? If so, give names of all such sicknesses or diseases, approximate dates of each, and names and addresses of all attending physicians He had been confined to hospital. Dr. O. F. Call of Pocatello, Idaho, was his physician.

18. Was deceased up to the time he received the fatal injury in sound condition physically and mentally? Yes.

19. (a) Had deceased ever at any time had fits, disorders of brain or nervous system, vertigo, hernia, rheumatism, heart disease or any chronic disease or physical defect or deformity? If so, explain fully He had a hernia. (b) Had he ever had any impairment in hearing? No. Vision? No.

20. What were deceased's habits as to the use of drugs or intoxicants Very temperate.

21. Was the deceased under the influence of drugs or intoxicants at the time of the accident? No.

22. (a) Did he carry any other accident Insurance? Give names and addresses of all companies, amounts and dates of policies \$5000 in the New York Life Insurance Co. (b) Did he carry any life insurance? Yes. Give names and addresses of all companies, amounts and dates of policies, and state which, if any, had Double Indemnity provisions and in what amount He had policies with the New York Life Insurance Co., and the Columbia National Life Insurance Co.

(Testimony of Walter M. Jones.)

23. By what right do you claim this insurance?  
As beneficiary of the Policy and his surviving wife.

I agree that in furnishing this and other blanks,  
the Company reserves all its rights under its policy  
contract and waives none of the terms or conditions  
thereof, or any forfeiture that may have accrued  
to it thereunder, and I reserve all of my rights.

/s/ CECELIA J. WILSON,

Age 52.

553 S. 6th, Pocatello, Idaho.

State of Idaho,

County of Bannock—ss.

Personally appeared before me the said Cecelia  
J. Wilson personally known to me to be the person  
represented to be and subscribed and made oath  
to the truth of the foregoing statement.

Witness my hand and seal at my office in Poca-  
tello, Idaho, this 9th day of July, 1947.

[Seal]      /s/ LAURA S. GOUGH,

Notary Public.

My Commission expires Sept. 18, 1950.

Received July 14, 1947.

Admitted Mar. 17, 1948.

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Mr. Davis: These matters are in the record.  
So I will now offer exhibit 6, the Undertaker's state-  
ment, that, too, is a sworn statement which was



(Testimony of Walter M. Jones.)

mailed to the Company and which Mr. Merrill has given me from their files.

Mr. Merrill: No objection.

The Court: Admitted.

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## PLAINTIFF'S EXHIBIT No. 6

### Undertaker's Statement

Business Men's Assurance Company of America,  
Kansas City, Mo.

1. Give name of deceased Harry H. Wilson.
2. Give the date and place of his death April 8, 1947, at Pocatello, Idaho.
3. What was the cause of death? Pulmonary Embolism.
4. Did you personally know the deceased during his life time? Yes.
5. Did you prepare the body for burial? Yes.
6. When and where was the body buried? Pocatello, Idaho, Mountain View Cemetery, at Pocatello, Idaho.
9. Do you know the body buried by you to be that of the person named as deceased in the beneficiary's statement which is a part of these proofs of death? Yes.

/s/ JACK HENDERSON,

So. Arthur, Pocatello, Idaho

State of Idaho,

County of Bannock—ss.

Personally appeared before me the said Jack Henderson personally known to me to be the person who represents himself to be and made oath to the truth of the foregoing statement.

Witness my hand and seal this 9th day of July, 1947.

[Seal]        /s/ LAURA S. GOUGH,  
Notary Public.

My Commission expires Sept. 18, 1950.

Received July 14, 1947.

Admitted

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LAURA S. GOUGH

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Now, Mrs. Gough, if you will get those exhibits 1 to 6 [109] in their order, please.

A. Yes, sir.

Q. You are employed in my office?

A. Yes, sir.

Q. And have been for a number of years?

A. Yes, sir.

Q. Do you as an office employee and secretary in that office take care of the filing of all corre-

(Testimony of Laura S. Gough.)

spondence and of the handling of all of the mail and records?      A. I do.

Q. I call your attention to the matter of Harry H. Wilson, deceased and the matter of his estate, are you familiar with that matter in my office?

A. I am.

Q. Are you familiar with the facts as to whether there were a number of insurance policies involved after his death?      A. I am.

Q. Do you know of your own knowledge of the receiving of blanks and claims from different insurance Companies?      A. I do.

Q. Have you looked at those six pages, those exhibits numbered one to six, which are original letters and statements. Now, calling your attention to those six exhibits have those, or were those under your care, and did you handle them in connection with the life insurance policy with [110] the Business Mens Assurance Company of America?      A. Yes, sir.

Q. Do you recognize,—for instance,—exhibit 1?

A. Yes, I do.

Q. And exhibit 2?      A. Yes, sir.

Q. I call your attention to exhibit number 2, and on the bottom of that there are four numbers indicating that there were four forms inclosed with that letter. Do you see those figures?

A. Yes, sir.

Q. Now, I will ask you to look at exhibits 5 and 6, who did the typing on those?

(Testimony of Laura S. Gough.)

A. On number five, I did that.

Q. And on number 6?

A. That was done by Jack Henderson, the undertaker.

Q. Did you take it to the undertaker and did you secure number 6?      A. Yes, sir.

Q. Did you take the other to Mrs. Wilson's home for her to sign?      A. Yes, sir, I did.

Q. Were all the forms that came to my office filled out?

A. All the forms we received were filled out.

Q. And were they returned?

A. Yes, sir. [111]

Q. Were there any other forms received in exhibit 2 except the forms five and six?

A. No, I don't believe there were. Those were the only two.

Q. What is your recollection as to whether all the forms received from this company, or any other company were filled out?

A. Every one was filled out.

Q. Have you searched your records to see if there was a form called "eye Witness" form or a "physician's form" included in this exhibit from the Business Mens Assurance Company?

A. Yes, sir, I have.

Q. Were they in the files?

A. They were not.

Q. Are they in the files?      A. They are not.

Mr. Davis: That is all, you may examine.

(Testimony of Laura S. Gough.)

Cross-Examination

By Mr. Merrill:

Q. There were a number of other insurance policies that were delivered to you?

A. There were a number of other policies.

Q. In each of these insurance policies there were claims presented to the Companies to be filled out,— I mean the claims were presented by the Companies?

A. Yes, sir. [112]

Q. In each of them there was always a Doctor's certificate?

A. I am not sure, but I think there was.

Q. As a matter of fact when you got plaintiff's exhibit 2, which is the letter from the Company, dated May 2, 1947, you noticed there were four exhibits listed on the bottom of the letter?

A. I don't recall that I did.

Q. They are listed there?

A. Yes, there is a list of numbers there.

Q. Do you know that those numbers refer to claims that were to be filled out?

A. No, I cannot say that I do.

Q. You didn't make comparison with the two that were filled out to see that the numbers were those numbers?

A. No, I don't think I did.

Q. You took any letter that Mr. Davis would write?

A. Yes, sir.

Q. Did Mr. Davis dictate any letter to the effect that there was no form for the Doctor's statement?



(Testimony of Laura S. Gough.)

A. I don't recall.

Q. You don't have a recollection that there was a Doctor's Statement?

A. I know that we sent back the forms we received.

Q. You received the letter indicating the four forms inclosed?

A. That letter is number 2. [113]

Q. You did not receive from Mr. Davis any letter, or any dictation advising the Company that there was no form for the Doctor's certificate?

A. Not that I recall.

Q. You didn't have any doctor's certificate form of the Business Mens Assurance Company?

A. We filled out all that we received.

Q. Did you fill out any for the Doctor, or do you recall having one filled out by the Doctor for Harry H. Wilson?

A. I don't recall that.

Q. You don't remember having any filled out?

A. I don't recall.

Mr. Merrill: That is all.

Mr. Davis: There was some confusion over exhibit 7 which is the original hospital record and exhibit "A" referred to in the deposition of Doctor Call's which was a photographic copy. The confusion came about through counsel's fault, and I don't mean counsel for the defendant. I have ascertained that it will be agreeable to leave with the hospital a photographic copy and that we may let number 7, the original hospital record, stay in the file and not ask to withdraw it.

(Testimony of Laura S. Gough.)

The Court: That will be satisfactory. I think we will recess for ten minutes. [114]

4:10 P.M., March 17, 1948

Mr. Davis: In the case of Wilson vs. Business Mens Assurance Company we rest.

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DR. MELVIN M. GRAVES

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle:

Q. How long have you been here in Pocatello?

A. About one and a half years.

Q. State briefly your formal education?

A. B.A. Western Reserve University and M.D. at Harvard Medical School. I have had about eight years' hospital training experience, limited solely to surgery.

Q. You have specialized in surgery for eight years? A. Yes, sir.

Q. Are you a fellow in the American College of Surgeons? A. Yes, sir.

Q. Certified by the American Board of Surgery?

A. Yes, sir.

Q. Are you the only Doctor in Pocatello so certified? A. So far as I know.

Q. You have had practical experience in herniorrhaphy?

(Testimony of Dr. Melvin M. Graves.)

A. I am a general surgeon and do a lot of hernias.

Q. During those years and while you were an interne what [115] experience have you had with pulmonary embolism?

A. I have seen quite a few such cases.

Q. Have you made a study of the cause and effect of emboli?      A. Yes, sir.

Q. Also the statistics as to their occurrences?

A. Yes, sir.

Q. Doctor, will you tell us briefly a surgeon's attitude toward any sort of embolism as to whether it is expected, anticipated and reasonably foreseen?

A. It is one of the complications which a surgeon may encounter in following major surgery.

Q. Is it the principal cause of post-operative deaths?

A. You mean by that all post-operative deaths,—I would rather alter that to limit it to hernia.

Q. Well, limit it to hernia.

A. It is the most common cause in hernia operations.

Q. Are there any precautions to avoid or prevent post-operative embolism?

A. Yes, there are.

Q. State generally what they are?

A. Early ambulation; getting the patient up soon after surgery so he is not bedfast.

Q. Pre-operative procedure I referred to in particular?

(Testimony of Dr. Melvin M. Graves.)

A. Well, there are certain clinics where rather radical type of treatment is done, that is ligation of femur veins in both legs on all patients in the older age group [116] who are subject to any major surgery.

Q. Are you familiar with the percentage of cases, in all age groups, of post-operative deaths resulting from pulmonary embolism?

A. In large hospitals where such statistics can be gathered approximately one in eight or nine hundred.

Q. That is major surgery of any kind?

A. Yes, sir.

Q. What could you say as to a surgeon commencing surgical procedure as to whether he could reasonably foresee pulmonary embolism in any surgical procedure?

A. It is something every surgeon undertaking an operation knows might happen and hopes wont happen.

Q. It is reasonably foreseeable in any operation?

A. I think that is a fair statement, yes, sir.

Q. What are the statistics with reference to hernia operations?

A. The present mortality rate for all hernias in well run institutions should run one and a half to two per cent mortality,—should be below that,—and over half of those will be due to pulmonary embolism.

Q. Over fifty per cent of post-operative deaths in hernia cases are due to pulmonary embolism?

(Testimony of Dr. Melvin M. Graves.)

A. Yes, sir.

Q. What effect does the age group have upon the expectancy of death from Pulmonary embolism in hernia operations? [117]

A. The expectancy is much greater in older age groups.

Q. What about a person sixty-one years old, what about that age group?

A. It would be four or five times more than in the third decade.

Q. A surgeon would expect four or five times as great a number of embolisms in that age group than in the younger group? A. Yes.

Q. Where is the most prevalent origin of embolus that might result in pulmonary embolism?

A. The best information gathered from autopsy statistics seems to point to the lower veins. In the calf muscles; the tibia which is the bone between the knee and the ankle, that is the most prevalent,—the place where the thrombi arises.

Q. Can they arise from immobilization?

A. Yes, sir, they can.

Q. Regardless of surgery?

A. Yes, sir, that's right.

Q. In post-operative procedure or treatment is the use of opiates common? A. Yes, sir.

Q. And sedatives? A. Yes, sir.

Q. What does sedatives do to a person, a patient?

A. It allays pain and depresses centers in the nerve system. [118]



(Testimony of Dr. Melvin M. Graves.)

Q. And brings about relaxation?

A. Yes, sir.

Q. What does it do to the breathing where a person is under opiates?

A. It tends to slow the respiration if it was an opium.

Q. Did you examine the hospital record in this case? A. I did, I think it was pantopon.

Q. What effect would that have as to relaxation?

A. That might produce considerable relaxation and tends to slow the respiration.

Q. What happens with reference to secretion and mucous draining to the trachea where a person is under that type of opiate and sedative?

A. It may tend to run down the trachea more than if the patient was awake.

Q. Is that the common and natural procedure and consequence in case of opiates following surgery? A. Yes, sir.

Q. Doctor, will you explain snoring?

A. It is caused by a relaxation of the jaw muscles which allows the mouth to open. Usually it is associated with an obstruction in the nasal cavity and the passing of air in this manner causes the soft palate to vibrate and the tongue may also drop backward which contributes to the noise. [119]

Q. Would that increase or decrease the mucous draining to the trachea?

A. It has been my observation that most patients who have been breathing that way, they tend to have a dry mouth because the air is not going through

(Testimony of Dr. Melvin M. Graves.)

nasal passage which is a humidifier and gets moisture in the air.

Q. When a person isn't under opiates and this mucous drains down the trachea what does he do?

A. He wakes with a start and tries to cough it up.

Q. When he isn't asleep?

A. He coughs it up.

Q. That is the mechanism to clear the trachea?

A. That's right.

Q. When he is under opiates that continues to drain?

A. Yes, sir.

Q. The mechanism for bringing it up isn't working?

A. It may not.

Q. Because of his being under the opiate?

A. That's right, that may contribute to it.

Q. When he wakes what is the post-operative treatment as to advising the patient what to do?

A. To turn this patient from side to side and encourage the patient to cough this material up.

Q. And what happens if that is not done?

A. This mucous may get to the smaller bronchi,—the smaller [120] air passage and it may lead to atelectasis.

Q. What is that?

A. It is a collapse of the lung.

Q. And results in what?

A. You have a very ill patient and they may, if infection develops on top of the atelectasis, they may die.

(Testimony of Dr. Melvin M. Graves.)

Q. It is proper procedure to urge them to cough and bring up that mucous?

A. That is right.

Q. Did you check the hospital record here, exhibit 7?

A. I checked a photographic replica of it.

Q. Can you tell from that record when Mr. Wilson started to deteriorate?

A. It appears that about 12:30 the respiration seemed to change in character and become irregular and cyanosis was noted at that time. That is apparently when the major trouble started.

Q. From an examination of that record, exhibit 7, could you ascertain the cause of Mr. Wilson's death?

A. No, I couldn't.

Q. Assuming that he died at five a.m. April 8, 1948, in the light of that record, from what cause could he have died?

A. He could have died from cerebro vascular thrombosis,—embolism; coronary thrombosis,—embolism or pulmonary [121] embolism.

Q. Acute heart failure?

A. That is possible.

Q. Could the cause of his death be determined other than by autopsy?

A. In my opinion, no.

Q. When immobilization takes place for any period of time just state in a general way the effect upon the circulatory system, will you, Doctor. Can you give the process of building up an embolism or thrombus if it has a tendency to do that?

(Testimony of Dr. Melvin M. Graves.)

A. Of course, immobilization means putting a person at rest,—bed rest, and such a situation leads to stasis of the blood?

Q. What do you mean by stasis?

A. The blood slows down in the rate of flow or stops flowing. This creates, particularly in the veins of the leg,—and the reason for this is the return of blood from the lower extremities is not a simple process, it is necessary that the lower extremities be moving, tracting of the muscles helps to propel the blood to the heart. If you have a patient in bed this rate of flow may slow down and it may stagnate.

Q. Where surgery is performed what effect does that have on stagnation in the abdominal and pelvic region and the lower extremities? [122]

A. You have to give some form of anesthesia to place that patient at rest and during that time the circulation becomes poor.

Q. It slows the circulation?                      A. Yes, sir.

Q. What does slow circulation do with reference to being a factor in the creation of emboli?

A. It is a major contributing factor. If there is a slight defect in the lining of the vessel, which is common in older people, this slow moving blood is much more likely to clot at that point.

Q. Suppose there is a thrombosis, what effect does the stagnation of the blood and immobilization have on that breaking?

A. Stagnation allows that clot to build up and become larger.

(Testimony of Dr. Melvin M. Graves.)

Q. And then break away?

A. In the direction of the heart until it gets to the next major branch. It is like a network of rivers and creeks, a clot is created at a certain point and then this will and does go back to the next largest tributary of the system. It gets into the circulation or the circulatory system.

Q. A thrombosis is attached to a major vessel?

A. Sometimes loosely attached.

Q. What causes it to break away?

A. Muscular activity.

Q. Doctor, what about the condition of the venous system [123] being a separate disease entity?

A. I don't see what you mean.

Q. Is it a co-existing condition?

A. Well, it is one of the systems of the body that has disease processes.

Q. Tell us, Doctor, about the disease process in the veins that is a co-existing condition with surgical procedure.

A. If I understand you,—an individual may have little plaques in these veins and you put him in bed for any reason,—for a major operation or anything; you immobilize him; that leads to stasis of the blood in these veins which may lead to thrombosis at the site of this abnormality in the vessel wall. It eventually gets back to this next major tributary as I said and at some time with what is characterized as a severe muscular strain this clot breaks off and goes into the general circulation; it



(Testimony of Dr. Melvin M. Graves.)

gets into a vessel that supplies the lung and if it is large enough to occlude this vessel the patient dies; if it is smaller and goes to a smaller vessel of the lung he may cough up blood.

Q. Can this be designated as a disease process of the veins?      A. Of the venous system.

Q. That is co-existing at the time of the surgical procedure?      A. Yes, sir.

Q. Can there be a thrombosis or clot remain after surgical operation that is not torn loose but remains in the [124] vessel itself?      A. Yes, sir.

Q. That can be loosened later?

A. Ordinarily when a clot remains for any length of time it undergoes reorganization as we say. It becomes definitely attached to the vessel and new blood vessels grow into it. That makes new small vessels through that clot.

Q. But it could break away?

A. Within certain length of time.

Q. A year?

A. I would say that is a little long. I would say not over three or four months.

Q. Following herniorrhaphy, in your opinion, would death following an embolism be the result of the herniorrhaphy?

A. Yes, I think it would.

Q. Explain why.

A. If a man has an inguinal hernia and on physical examination you find he is in reasonably good health; you admit him to the hospital, you admit

(Testimony of Dr. Melvin M. Graves.)

him for operative treatment; you are going to repair it by surgery; that is the disease for which he is admitted to the hospital. If he dies from some secondary event the hernia for which he is admitted is the principal cause of death and the terminal event is a contributing cause of death. [125]

Q. Would any effect that was dependent upon the venous system be incidental to that surgical procedure? A. Yes.

Q. And co-existing with it? A. Yes, sir.

Q. Under those conditions would you say that the hernia was the contributing cause?

A. I would say it is the principal cause; no hernia, no death. If it had not been that he was admitted to the hospital for treatment for hernia he would not have died.

Mr. Eberle: I believe that is all.

### Direct Examination

By Mr. Merrill:

Q. Doctor, assuming that the man died of pulmonary embolism—withdraw that, please,—Doctor, I understood you to say you studied the chart and the deposition of Doctor Call? A. Yes, sir.

Q. From such information as you were able to get from that study one cannot say that he died from Pulmonary embolism, is that right?

A. I cannot say that.

Q. Would you say that the average practitioner would be able to say that; one skilled in surgery, would he be able to say that?

(Testimony of Dr. Melvin M. Graves.)

A. In my opinion it would be necessary to have an autopsy. [126]

Q. If he died from pulmonary embolism, would the operation for hernia twenty hours earlier be a contributing cause?

A. In my opinion it is the chief cause.

Q. If there had been no hernia there would have been no operation? A. That is right.

Q. If there was no operation there would be no embolism? A. That is right.

Q. If there had been no embolism there would have been no death? A. That is right.

Q. So death was directly caused by the hernia?

A. That is my opinion.

Q. Hernia was a bodily infirmity?

A. That is right.

Mr. Merrill: That is all.

Mr. Davis: No questions.

Mr. Eberle: I would like to have published the deposition of Doctor Beeman, Doctor Swindell, Doctor Pittenger and Doctor James L. Stewart.

Mr. Davis: They can be considered as read from the witness stand, as far as I am concerned.

The Court: Then it will be understood that the Court reporter can copy them into the record.

Mr. Merrill: With like effect as if read at this time and as if the witness was on the stand. [127]

The Court: It will be understood that the Court reporter can copy them into the record with that effect, Mr. Merrill.

(Testimony of Dr. Melvin M. Graves.)

Mr. Davis: We haven't made any objections throughout the depositions.

The Court: And you have read the depositions, Mr. Davis?

Mr. Davis: Yes, Your Honor, and I waive any objection to any of those questions.

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### DR. JOSEPH BEEMAN

after being first duly sworn, testifies as follows on behalf of the defendants:

#### Direct Examination

By Mr. Eberle:

Q. Will you state your name?

A. Joseph Beeman.

Q. Where do you reside?

A. Boise, Idaho.

Q. And your profession?

A. Physician and surgeon.

Q. State generally your formal qualifications, your education?

A. I graduated from the University of Oregon Medical School in 1937. I have had post-graduate training in pathology. I am a certified specialist in pathology, certified by [128] the American Board of Pathology and a member of the American College of Pathologists.

Q. You are licensed to practice medicine in Idaho? A. Yes, sir.

Q. Were you an instructor in pathology at Oregon? A. Yes, sir. 1939 to 1946.

(Testimony of Dr. Joseph Beeman.)

Q. Did you practice pathology in Oregon?

A. Yes, sir.

Q. During what period did you practice pathology in Oregon?      A. 1937 to 1946.

Q. You came to Idaho in 1946?

A. Yes, sir.

Q. And since then you have practiced in Boise?

A. Yes, sir.

Q. What official position do you hold here in Boise?

A. Attending pathologist at St. Lukes and consulting pathologist at the Veterans Administration, Boise.

Q. Since 1946 have you performed any autopsies in southern Idaho?      A. Yes, sir.

Q. About what percentage of the autopsies have you performed in Boise?

A. I would say about sixty per cent.

Q. Of all autopsies performed? [129]

A. Yes, sir, in Boise, in other communities I am not familiar.

Q. Now, Doctor, can you give us the approximate number you have had since you have been in Boise?

A. Probably between a hundred and a hundred fifty.

Q. Autopsies?      A. Yes, sir.

Q. You have also done autopsies elsewhere?

A. Yes, sir.

Q. Give the approximate number?

A. Something over two thousand.



(Testimony of Dr. Joseph Beeman.)

Q. Have you read the deposition of Dr. O. F. Call, taken in this case?

A. I have read it, yes, sir.

Q. And have you examined the hospital record referred to in this deposition, as exhibit A?

A. Yes, sir.

Q. Now, Doctor, will you briefly describe what is known as embolism?

A. An embolism is the plugging of a hole or the hole in an artery due to foreign materials or due to fragments of blood clot which arise in another primary source.

Q. And what is a pulmonary embolism?

A. A pulmonary embolism is the plugging of the hole in the pulmonary arteries by a foreign material or blood clot which arises from some other source. The pulmonary arteries [130] are the large blood vessels leading from the heart to the lungs supplying the lungs with blood.

Q. Can you distinguish for us embolism and thrombosis?

A. Yes, sir.

Q. Do so.

A. Well, a thrombus is a clot of blood inside a blood vessel during life; an embolus is a portion of this blood clot or other foreign material which is set loose in the blood stream and travels through the blood stream. In other words, a thrombus is a clot in the vessel wall, whereas, an embolus is a moving particle of this clot or other foreign body.

Q. Is the symptomatology similar in the case of

(Testimony of Dr. Joseph Beeman.)

death of pulmonary embolism and death as a result of coronary thrombosis?

A. The symptoms of death from pulmonary embolism and death from coronary thrombosis may be quite similar.

Q. Doctor, is the case of post-operative death occurring approximately twenty hours after surgery, in your opinion, can it be determined whether such death occurred as a result of pulmonary embolism or coronary thrombosis without an autopsy?

A. In my opinion it cannot.

Q. Does a pulmonary embolism originate in the venous portion of the vascular system? [131]

A. Yes, sir.

Q. State just how pulmonary embolism arises in the venous system, will you, Doctor?

A. A pulmonary embolism arises in the venous system either by introduction of foreign material such as oil or air into the venous circulation or due to disease of the venous circulation, caused by stagnation of blood, infection or injury; blood clots in the venous system with a resulting venous thrombus; particles of this thrombus or blood clot in the venous system become detached and travel through the veins to the right side of the heart and from there are propelled into the pulmonary arteries causing a blocking of these arteries, or pulmonary embolism.

Q. Assuming, Doctor, that Harry H. Wilson, referred to in the deposition of Dr. O. F. Call, died

(Testimony of Dr. Joseph Beeman.)

of a pulmonary embolism approximately twenty hours after a hernia operation, referred to in said deposition, which took place on April 7, 1947. In your opinion would prior surgery, referred to in said deposition, including a hernia operation upon the man have any effect upon such a pulmonary embolism?      A. In my opinion, yes.

Q. In what way?

A. For the reason that an operation for intestinal obstruction and repair of the hernia could easily have caused a venous thrombus at that time, and the hernia operation on April 7, [132] 1947, may have been the exciting factor in causing this venous thrombus to break down and form a pulmonary embolism.

Q. Doctor, in your opinion is a pulmonary embolism a probable result of a hernia operation?

A. Yes, sir, a pulmonary embolism may be anticipated and expected following a hernia operation or any other abdominal surgery.

Q. Doctor, in your opinion, can a pulmonary embolism come from immobilization at the time of the surgical procedure?

A. Yes, sir, for the reason that immobilization during and following surgical procedure, as well as the effect of the anesthetic tends to cause stagnation of the blood in the veins,—in the venous system and this stagnation is one of the major causes of venous thrombus and venous thrombus is likewise the major cause of pulmonary embolism.

(Testimony of Dr. Joseph Beeman.)

Q. Doctor, where a hernia operation has been skillfully performed, in your opinion, would a pulmonary embolism be a natural result of the immobilization incident to the surgical procedure?

A. Yes, sir.

Q. Just explain in what way such result would be a natural consequence?

A. The immobilization of the patient with resulting stagnation of blood may in itself cause venous thrombus with resultant pulmonary embolism.

Q. Now, Doctor, referring to the hospital chart or record marked exhibit "A" and from an examination of the hospital record marked "A" when did the process which terminated in death commence?

A. The nurse's notes, beginning at 12:30 a.m. Tuesday, April 8, 1947, indicated that at that time the patient became cyanotic, had irregular respiration and from this time until his death at 4:45 a.m. the nurse's notes indicate the patient progressed into death.

Q. Doctor, from an examination of the hospital record exhibit "A," can one, in your opinion, reasonably conclude that death was the result of pulmonary embolism?

A. From an examination of the record Exhibit "A," in my opinion, I cannot conclude the cause of death, whether from pulmonary embolism or other causes.

Q. Can you conclude from an examination of ex-

(Testimony of Dr. Joseph Beeman.)

hibit "A" that Harry H. Wilson died of a pulmonary embolism?           A. No.

Q. Now, Doctor, in your opinion, is post-operative pulmonary embolism reasonably foreseeable?

A. Yes, sir.

Q. Is it sufficiently foreseeable that precautions are taken to avoid it?           A. Yes, sir.

Q. Assuming the fact stated in the deposition of Doctor Call [134] and in the hospital record, exhibit "A" to be true, and that Harry H. Wilson died about five o'clock a.m. on April 8, 1947, of a pulmonary embolism, in your opinion, was such an embolism, under such circumstances reasonably foreseeable?

A. Yes, under the facts as given, a pulmonary embolism should have been looked for and anticipated.

Q. Now, Doctor, is a post-operative pulmonary embolism a natural result or consequence of surgical procedure or immobilization?

A. Assuming skilfull surgery without a large amount of manipulation and injury, the pulmonary embolism is a result of co-existing disease process in the venous system and a natural result of surgery or immobilization.

Q. Now, Doctor, in case of inguinal hernia where the operation was skilfully performed without any unusual incident, the operation being very smooth, would there be any large amount of handling or injury such as you mentioned above?           A. No.



(Testimony of Dr. Joseph Beeman.)

Q. Doctor, assuming the facts in the deposition of Doctor Call and the hospital record exhibit "A" to be true, and that Harry H. Wilson died of a pulmonary embolism at five o'clock a.m., April 8, 1947, would such an embolism be anticipated under such circumstances?

A. Yes, sir, in any surgical procedure a pulmonary embolism should be anticipated. [135]

Q. Now, Doctor, is a post-operative pulmonary embolism accidental?

A. In my opinion post-operative pulmonary embolism is not accidental for the reason that it arises from a diseased process of the venous system and is anticipated.

Mr. Eberle: That is all, thank you, Doctor.

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### DR. O. F. SWINDELL

called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Eberle:

Q. State your name, please?

A. O. F. Swindell.

Q. You reside at Boise? A. Yes, sir.

Q. And your profession? A. Medicine.

Q. You are licensed to practice medicine in the State of Idaho? A. Yes, sir.

Q. State briefly your formal qualifications?

A. My education and so forth, you mean?

(Testimony of Dr. O. F. Swindell.)

Q. Yes.

A. Graduated from Jefferson Medical, Philadelphia, in 1926. [136] Served two years in the Philadelphia General Hospital and came to Idaho in 1928, entered the practice with Dr. E. Laubaugh and practiced with him until 1933 and since that time I have practiced internal medicine in my own office in Boise.

Q. You are practicing internal medicine, specializing in that? A. Yes, sir.

Q. You have been Chief of Staff at St. Luke's Hospital?

A. Yes, sir, two or three years during the war.

Q. It was about 1942 to 1945?

A. I think that is right and I was also president of the State Medical Association at one time.

Q. Have you read the deposition of Dr. Call in this case? A. Yes, sir.

Q. Have you examined the hospital record referred to in the deposition of Dr. Call's, as exhibit "A"? A. Yes, sir.

Q. Dr., can you describe briefly and in as much lay language as possible the nature and description of pulmonary embolism?

A. Pulmonary embolism is the result of a blood clot which becomes free in the blood stream and is carried to the lungs by way of the heart to the pulmonary artery, lodging in a vessel in the involved lung. I might qualify that by saying that a clot or other foreign body. Anything can produce it besides a clot. [137]

(Testimony of Dr. O. F. Swindell.)

Q. Doctor, can you tell us briefly about a thrombus or thrombosis?

A. A thrombus is a clot, a blood clot which forms within a vessel resulting in an obstruction of the vessel at the site of its formation.

Q. Is there any substantial difference in the symptomatology of a pulmonary embolism and a thrombus?      A. No.

Q. The embolism arises in the venous system, is that correct?

A. Yes, it could arise in the venous system or arterial system or it may arise in the heart.

Q. All pulmonary embolisms arise in the venous system, is that right?

A. Or the right side of the heart which is theoretically a part of the venous system?

Q. Can you distinguish between coronary thrombosis and pulmonary embolism?

A. Both conditions produce obstruction to the involved vessel. In a pulmonary embolism the involved vessel is in the lung, in coronary thrombosis the embolism is in one of the coronary vessels of the heart. Symptomatically they are difficult to distinguish.

Q. Can you tell the difference in the origin of the clot in those two, coronary thrombosis and pulmonary embolism?      {

A. In coronary thrombosis the clot originates in the coronary [138] artery; in pulmonary embolism the clot originates either in the heart or in the venous system?

(Testimony of Dr. O. F. Swindell.)

Q. Can you describe briefly how and in what manner embolism originates in the venous system?

A. When the embolus originates in the venous system there is first formed a thrombus; portions of this thrombus break off and float free in the blood stream producing an embolus.

Q. Can these particles break loose as an incident to surgical procedure?           A. Yes, sir.

Q. That would be due to trauma or ligation?

A. Due to a number of factors, one is trauma from surgery, another is immobilization of the patient in bed, other contributing factors are the age of the patient and his general condition at the time of the operative procedure.

Q. Now, Doctor, is pulmonary embolism a reasonably foreseeable thing? Is pulmonary embolism reasonably foreseeable from surgical procedure and immobilization?

A. Any patient who is operated on presents a potential case for pulmonary embolism.

Q. When you mention operations you include operations for hernia?

A. Any kind of operation.

Q. Would the same be true of immobilization as incident to [139] surgical procedure?

A. Yes, immobilization predisposes to the formation of thrombi and emboli.

Q. In your opinion pulmonary embolism is a risk or hazard in every case of surgical procedure or immobilization?           A. Yes, sir.

(Testimony of Dr. O. F. Swindell.)

Q. Is there any preventative to prevent or mitigate pulmonary embolism? A. Yes, sir.

Q. In your opinion is this procedure based upon the fact that pulmonary embolism is reasonably foreseeable in any of these cases?

A. Yes, sir, I think so. Most surgeons use a measure to prevent emboli in the care of every post-operative patient.

Q. Including operations for hernia?

A. Yes, sir, including operations for hernia.

Q. Doctor, from an examination of the hospital record exhibit "A", in your opinion, is there anything to indicate that the death of Harry H. Wilson was due to pulmonary embolism?

A. The record indicates that the man died very suddenly and death from pulmonary embolism or pulmonary emboli can be sudden, but sudden death doesn't indicate that the man died from pulmonary embolism.

Q. The record, in your opinion, would be symptomatic of what? [140]

A. The record mentions that the patient had irregular breathing and irregular pulse, that he was restless. The irregular pulse would indicate that there was some heart disturbance at this time; irregular respiration could be the result of a heart disturbance or the result of administration of drugs to control pain.

Q. In your opinion, is a post-operative pulmonary embolism accidental?



(Testimony of Dr. O. F. Swindell.)

A. No, I don't think it is.

Q. Will you just state your reasons, briefly?

A. Post-operative embolism is something which surgeons think of or anticipate prior to and after surgery. They all take certain measures to reduce the chances of post-operative pulmonary embolism.

Q. Is it one of the natural consequences of every surgery or immobilization?

A. Yes, I think it is.

Q. Whenever you say surgery that includes hernia operations?

A. It includes all operations whether it is hernia or anything else.

Q. Doctor, in your opinion are post-operative deaths following hernia operations more prevalent than in other surgical procedure?

A. The only comparison is in Cecil's Text Book of Medicine in which he states that pulmonary emboli following operations [141] for hernia are five times more frequent than in operations for appendicitis, except in cases where the appendix is ruptured.

Q. Is Cecil's Text Book of Medicine a recognized authority in the medical profession?

A. Yes, sir, it is.

Q. Doctor, assuming the facts stated in Doctor Call's deposition and the hospital record, exhibit "A" referred to in such deposition to be true and that Harry Wilson died about five o'clock A. M., April 8, 1947, of a pulmonary embolism. In your opinion, was such embolism to be anticipated as a

(Testimony of Dr. O. F. Swindell.)

natural and probable result of the surgical procedure mentioned in such deposition and in Exhibit "A", and was it reasonably foreseeable?

A. Yes, sir, in that we know that a certain percentage of all surgical cases have emboli and this percentage is particularly high in the age group in which this patient falls.

Q. Assuming, Doctor, that Harry Wilson died of a coronary thrombosis, in your opinion, would such thrombosis be accidental?      A. No.

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DR. F. A. PITTENGER

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle: [142]

Q. State your name, Doctor?

A. F. A. Pittenger.

Q. You live in Boise?      A. Yes, sir.

Q. Your profession?

A. Physician and surgeon.

Q. You are licensed to practice in Idaho?

A. Yes, sir.

Q. State your formal qualifications, briefly?

A. Well, I have practiced medicine for forty-nine years, ninety percent of my practice has been surgery.

Q. Your education and training?

(Testimony of Dr. F. A. Pittenger.)

A. Graduated from two schools and served an internship, worked for a physician four years on a salary; associate professor of surgery in Honaman Medical in Chicago.

Q. You have been Chief of Staff at St. Alphonsus Hospital for a good many years?

A. Twenty-two years.

Q. Doctor, in your half century of surgical practice how many cases of surgery would you say you have had?

A. Oh. I don't know, but many thousands.

Q. Doctor, in your long career as a surgeon you have become familiar with the cause and effect of embolisms?

A. Yes, sir.

Q. Also pulmonary embolism? [143]

A. Yes, sir.

Q. Will you just state briefly where a pulmonary embolism comes from, Doctor?

A. In case of surgery it ordinarily comes from the site of the operation where a blood clot has formed, this clot, or a portion or fragment of the clot has gotten into the circulation and it continues in circulation until it becomes fastened to the channel in which it is circulating, that is, it gets in a smaller channel where its size prevents its continuing.

Q. Doctor, is it not a fact that in the case of surgery, embolism may also come from the fact that the patient is immobilized?

A. That is right, yes, sir.

Q. In your opinion, Doctor, is a pulmonary embolism accidental?

(Testimony of Dr. F. A. Pittenger.)

A. In my opinion it is not.

Q. State your reasons for that answer?

A. My personal interpretation of an accident is that it is an unusual and unexpected incident that causes a catastrophe of some degree. Pulmonary embolism following surgery or a surgical operation in the nature of a hernia or a pelvic operation is not unexpected because statistically it is the largest single cause of death following surgical operations such as I mentioned. To all men doing major surgery that is one of the biggest hazards in the procedure. [144] He always has that in mind and is on the lookout for that sort of thing, consequently, I don't consider it unexpected.

Q. Doctor, would you say in your opinion that pulmonary embolism is reasonably foreseeable?

A. No, I don't think it is reasonably foreseeable, but it is reasonable to expect one.

Q. It is reasonably expectable?

A. Yes, sir.

Q. Are there preventative measures to eliminate or mitigate such embolisms?

A. Recently there has been an effort to use medication which the profession thought might have some bearing on the formation of embolisms, to prevent the formation of the embolus; then there is the after treatment in which we mobilize the patient through some form of movement that will help the circulation; to guard against complete immobilization, and after the damage is done sometimes efforts are made

(Testimony of Dr. F. A. Pittenger.)

to prevent further embolisms or embolus. I know of no method possible to use in all cases because the end result is that they are more or less hazardous in themselves.

Q. Doctor, isn't it a fact that fifty per cent of post-operative deaths are due to embolism?

A. Yes, that is practically correct. [145]

Q. Have you read the deposition of Doctor Call in these cases? A. Yes, sir.

Q. Have you examined the hospital record exhibit "A"? A. Yes, sir.

Q. Assuming the facts therein to be true and that Harry Wilson died at about five o'clock A. M., April 8, the morning after the operation, in your opinion was the pulmonary embolism accidental, was it an accident?

A. Not under my interpretation of an accident.

Q. Would you say under those facts the pulmonary embolism was probable and to be anticipated and expected?

A. It was to be anticipated.

Q. And expected? A. Yes, and expected.

Q. Doctor, from an examination of the hospital record, exhibit "A", from midnight on April 7th, to the time of his death, in your opinion, was there a condition of profound shock? A. Yes, sir.

Q. Would this be a symptom of pulmonary embolism and could it be symptomatic of coronary thrombosis? A. Yes, sir, it could.

Q. Will you explain that answer?



(Testimony of Dr. F. A. Pittenger.)

A. I am unable to tell from the records to my own satisfaction whether this was a pulmonary embolism or some other type of chest embolus. [146]

Q. Doctor, assuming that the patient Harry Wilson was operated on for hernia about eight or nine o'clock on the morning of April 7, and that he died of pulmonary embolism about five o'clock on the morning of the 8th. If he did die from such embolism would the operation for hernia be a contributing cause? A. Yes, sir.

Q. Assume, Doctor, that Harry H. Wilson was suffering from hernia and that he was operated on for such a hernia and his death followed within approximately twenty hours thereafter, either from pulmonary embolism or some other similar cause, would the fact that he was operated on for hernia be a contributing cause of his death? A. Yes, sir.

Q. Doctor, state whether or not the hernia sustained by Mr. Wilson as disclosed by the testimony of Doctor Call and the exhibit "A" introduced in evidence, was a contributing cause of the death of Harry H. Wilson? A. Yes, sir.

Q. Doctor, in your opinion, are post-operative deaths in the case of hernia and other pelvic operations more prevalent than other types of operations?

A. Yes, sir, they are. They are more prevalent than in other general operations?

Q. In your opinion, Doctor, is post-operative embolus a natural [147] consequence of surgical procedure and immobilization incident thereto?

(Testimony of Dr. F. A. Pittenger.)

A. Yes, sir.

Q. And post-operative pulmonary embolism is reasonably foreseeable in the sense that it is expected?

A. Yes, they are expected.

Q. If post-operative pulmonary embolism is an accident, what would you say as to other causes of death?

A. All deaths are accidental if that is true.

Q. But you don't think it is true?

A. I don't believe it is true.

Mr. Eberle: That is all, Doctor.

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JAMES L. STEWART

Called as a witness by the defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Eberle:

Q. State your name, Doctor?

A. James L. Stewart.

Q. Your profession?

A. Physician and surgeon.

Q. You live in Boise? A. Yes, sir.

Q. You are licensed to practice in Idaho?

A. Yes, sir. [148]

Q. State briefly your educational qualifications?

A. I graduated from Rush Medical College, University of Chicago, in 1899.

Q. Where have you practiced?

A. One year in Nebraska, a year and a half in Chihuahua, Mexico, and since March, 1902 in Boise.

(Testimony of Dr. James L. Stewart.)

Q. In your forty-six years in Boise have you specialized in surgery?

A. Yes, most of that time.

Q. You have performed many thousands of operations?

A. Yes, there are some twenty thousand histories on file in there now.

Q. You were chief-of-staff at St. Luke's Hospital for how many years, Doctor?

A. Chief of the organized staff for twenty-nine years and chief of the hospital for thirty-four years.

Q. In your practice of surgery you are familiar with embolisms and particularly pulmonary embolism?

A. Yes, sir.

Q. Doctor, in your opinion where a hernia operation was skilfully performed without unusual incident and death occurred within twenty hours after the operation, would you say that such embolism was accidental—if death was from pulmonary embolism?

A. No, I don't think I could say that. [149]

Q. Would you say it was expected?

A. It is something that could be expected in a certain number of cases.

Q. Post-operative pulmonary embolism is something that is reasonably foreseeable?

A. Yes, sir, it is foreseeable.

Q. Are pulmonary embolisms more prevalent in hernia and pelvic operations than in other general operations?

A. Yes, more so than in other classes of operations; next in line would be fractures.

(Testimony of Dr. James L. Stewart.)

Q. Is there preventative procedure to prevent or mitigate pulmonary embolism?

A. There is an effort to do that by the use of heparin and dicumerin and certain post-operative exercise; the use of the legs, sitting up in bed and so forth, but none are very effective.

Q. Doctor, you have read the hospital records as a part of the deposition of Doctor Call, which is marked as exhibit "A"? A. Yes, I have.

Q. From an examination of that record can you tell us what it shows with reference to the diagnosis of the cause of Mr. Wilson's death?

A. I would say that it is not clear from the record here that the patient died from pulmonary embolism, but rather that he had a progressive heart failure as indicated by [150] the irregular pulse and the type of respiration which resembles Cheyne-Stokes respiration.

Q. Just explain to us the symptomatology as indicated by this report?

A. Well, the symptomatology is that there was a slight increase in temperature, diaphoresis—that is sweating; irregular pulse and the Cheyne-Stokes type of respiration would point more to progressive heart failure. The ordinary symptoms of pulmonary embolus are pain in the chest, some coughing and small amount of blood frequently, with difficulty of breathing and secondary heart failure.

Q. Now, Doctor, in a clean surgical case where the operation was skilfully performed without incident,

(Testimony of Dr. James L. Stewart.)

tell us the percentage of deaths of all post-operative deaths, that are due to pulmonary embolism?

A. Well, I don't know the exact percentage but I would say it is very high, perhaps seventy or eighty.

Q. Seventy or eighty per cent of all post-operative deaths, where the operations are skilfully performed and are clean operations, are due to pulmonary embolism?

A. I should also say pulmonary embolisms or cerebral embolism.

Q. Going back to exhibit "A", can you tell us whether in your opinion the reference to a heart condition during the last six or seven hours before death indicated a weakness of the heart muscles or pulmonary embolism? [151]

A. I would say it indicated a weakness of the heart muscle.

Q. Where there is a weakness of the heart muscle, is there also a natural consequence from surgical procedure that might result in death without a pulmonary embolism? A. Yes, sir.

Q. State what happens?

A. The condition of secondary shock might occur due to the general condition of the patient.

Q. And his heart would not stand the shock of the surgery?

A. That is right, yes, I might say that.

Q. Now, Doctor, in view of the hospital record, in your opinion, could the cause of his death be correctly diagnosed without an autopsy? A. No.



(Testimony of Dr. James L. Stewart.)

Q. Assuming that Mr. Wilson was sixty-one years of age at the time of death, what would you say as to whether post-operative pulmonary embolism would be more probable and expected in his case than in that of a younger person?

A. No, I don't think so, because it occurs in all ages.

Q. Assuming, Doctor, that Harry H. Wilson was afflicted with a hernia and that he was operated on for this hernia at about eight o'clock or nine o'clock a.m., April 7, 1947, and that he died a little before five o'clock a.m., April 8, 1947, from pulmonary embolism or coronary embolism, [152] would hernia and the treatment therefor be a contributing cause to his death?

A. Yes, sir.

Q. Would the operation for the hernia under such condition and the existence of the hernia be a contributing cause to his death, if he had died from other causes?

A. Yes, sir, it would.

Q. State whether or not the fact that he had a hernia and was operated for the hernia and subsequently died be in and of itself a contributing cause to his death?

A. Yes, sir.

Q. Is embolism a natural consequence of operative procedure or immobilization, where it occurs?

A. It is in certain instances. It does occur.

Q. It is a natural consequence where no intervening factor takes place such as infection or unskilful procedure?

A. Yes, it occurs.

Q. Doctor, having considered the testimony of

(Testimony of Dr. James L. Stewart.)

Doctor Call, and the hospital record as shown by exhibit "A" state whether the death of Harry H. Wilson was caused wholly or partly, or the result contributed to by the existence of the hernia and the treatment therefor?       A. Yes, it was.

Mr. Eberle: I think that is all, thank you, Doctor. [153]

(Statements of Counsel and Court as to preparation of transcript reported but not transcribed.)

(Statements of Counsel and Court concerning copying of decisions of the Supreme Court of Missouri in certain cases into this record reported but not transcribed.)

The Court: I can relieve your mind on that matter. If the Court determines that the law of the State of Missouri applies to this, then I will consider the law of Missouri, and any cases considered by the Supreme Court of the State of Missouri will be considered by this Court. I recognize counsel here are able counsel and I don't want to deny them anything they think is necessary in this record. I have heard of pleadings and records and so forth being made a part of the record but never decisions of other Courts copied. However, as I say, I don't want to bar you from doing anything you think is necessary.

Mr. Merrill: Then I will offer them in evidence as exhibits. The Reporter has the name.

The Court: The Court will overrule the objection, or rather will admit them as exhibits at this time subject to the objection with the understanding that the

(Testimony of Dr. James L. Stewart.)

Court will determine this on the determination of the case finally.

Mr. Merrill: And they may be considered in Statements, etc., [154] evidence.

The Court: Subject to Mr. Davis' objection. If I sustain Mr. Davis' objection they will be stricken.

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### WALTER M. JONES

Recalled as a witness by the defendant, having heretofore been duly sworn, testifies as follows:

#### Direct Examination

By Mr. Merrill:

Mr. Jones, I call your attention to plaintiff's exhibit "2", down at the bottom of that exhibit there are four letters and figures?      A. Yes, sir.

Q. Read them?

A. C-51-2; C-50-2; C-53-2, C-52-2.

Q. Is it C-53-2 or C-53-1?

A. That's right, it is C-53-1.

Q. What do those figures and letters have reference to?

A. Those are the usual forms mailed to the beneficiary upon being advised of the death of the policyholder.

Q. What are those called?

A. Proof of death.

Q. Name them?

A. Beneficiary's statement.

Q. Is that the claimant's statement?

(Testimony of Walter M. Jones.)

A. Yes, sir. [155]

Q. Is that Statement introduced as exhibit 5?

A. As number 5.

Mr. Merrill: May it be admitted that exhibit 53-1 is the undertaker's statement.

Mr. Davis: There is no exhibit 53-1.

Q. Mr. Jones, I hand you exhibit marked "62" and ask you if that is what is referred to as C-53-1?

A. Yes, sir.

Q. And exhibit "5" is C-51-2?

A. That is right.

Q. And there is missing C-52-2?

A. That is one missing, there are two.

Q. What are those two missing?

A. Statement of attending physician, and the statement of eye witness.

Q. Are those four statements always sent out when the Company is advised of the death of a policy holder?

A. Yes, sir, I think they are.

Q. Those are the forms required to be submitted to the Company?            A. Yes, sir.

Mr. Merrill: That is all, you may examine.

#### Cross-examination

By Mr. Davis:

Q. Those are matters taken care of in Kansas City?            A. Yes, sir. [156]

Q. That is one of the things they do in Kansas City that you know about?

(Testimony of Walter M. Jones.)

A. Yes, that is the regular procedure.

Mr. Davis: That is all.

Mr. Merrill: That is all, we rest.

Mr. Davis: No rebuttal [157]

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Certificate

State of Idaho,

County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the duly qualified and appointed official Court reporter of the United States District Court for the District of Idaho; that I reported in shorthand the evidence and proceedings had in and about the trial of the above entitled cause, and thereafter transcribed in long-hand (typewriting) the same, and that the foregoing transcript is a true and correct transcript of the testimony given, and the proceedings had in and about the trial of the said cause.

In witness whereof I have hereunto set my hand this 29th day of July, 1948.

G. C. VAUGHAN,  
Official Reporter.

[Endorsed]: Filed August 4, 1948.



[Endorsed]: No. 12284. United States Court of Appeals for the Ninth Circuit. Cecelia J. Wilson, Appellant, vs. Business Men's Assurance Company of America, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed July 5, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the Circuit Court of Appeals of the United States for the Ninth Circuit

No. 12284

CECELIA J. WILSON,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a Corporation,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION THEREOF.

Comes Now the appellant and hereby adopts as her Statement of Points upon which she intends to rely on appeal, the Statement of Points on which Cecelia J. Wilson Intends to Rely on Appeal heretofore filed with the Clerk of the United States District Court for the District of Idaho, from which court this

appeal is taken, such Statement of Points being that appearing in the transcript certified to this Court for said Clerk of the United States District Court for the District of Idaho.

Appellant hereby designates for printing as the parts of record necessary for the consideration of said points, the entire transcript, including transcript of evidence, as certified to the Clerk of this Court by the said Clerk of the United States District Court for the District of Idaho, expressly excluding, however, the Exhibits, and appellant prays that such Exhibits be considered in their original form by this Court as a part of the record on such appeal.

/s/ B. W. DAVIS,

Attorney for Appellant.

Service acknowledged July 13, 1949.

[Endorsed]: Filed July 14, 1949.

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[Title of Circuit Court and Cause.]

## DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED

Comes now the appellee and designates as additional parts of the record for printing, which is necessary for a consideration of the cause, the following: All exhibits introduced as evidence in said cause save and except plaintiff's exhibit No. 7, which is the original hospital record, defendant's exhibit No. 8, which is the deposition of Dr. Call (assuming said deposition has been read into the record and is a part of the testimony to be printed), plaintiff's exhibit No.

12, which is a cancelled check, defendant's exhibits Numbers 13 and 14, which are court cases.

/s/ A. L. MERRILL,

/s/ R. D. MERRILL,

/s/ W. F. MERRILL,

Attorneys for Appellee.

Service acknowledged July 15, 1949.

[Endorsed]: Filed July 18, 1949.

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In the Circuit Court of Appeals of the United States  
for the Ninth Circuit

CECELIA J. WILSON,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a corporation,

Appellee.

APPLICATION FOR ORDER DISPENSING  
WITH PRINTING EXHIBITS

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of Cecelia J. Wilson respectfully shows:

That an appeal has been perfected by your petitioner to this Court from a judgment rendered in the United States District Court for the District of Idaho, in a suit wherein Cecelia J. Wilson was plain-

tiff and Business Men's Assurance Company of America, a corporation, was defendant.

There were introduced in evidence at the trial of the cause by the respective parties, the following exhibits, to wit:

Exhibits 1 to 4 inclusive, consisting of Letters between B. W. Davis and Appellee;

Exhibit 5, Beneficiary Statement;

Exhibit 6, Undertaker's Statement;

Exhibit 7, Hospital Record;

Exhibit 11, Insurance Policy;

Exhibit 12, Cancelled Check,

all of the above Exhibits being introduced on plaintiff's case.

Exhibit 9, Photostatic Proof of Death;

Exhibit 10, Certificate of Death;

Exhibit 13, Decision of the Supreme Court of Missouri;

Exhibit 14, Decision of the Supreme Court of Missouri,

all of the above exhibits being introduced on defendant's case.

That the exhibits which appellant believes would be impractical and difficult to print and for which appellant makes application for an order dispensing with the printing are:

Exhibit No. 7, Hospital Record, consisting of reports and charts of an involved and lengthy character and which would be costly and difficult to print;

Exhibit No. 11, Insurance Policy which is lengthy and would be difficult to print;

Exhibit No. 13 and Exhibit No. 14, consisting of court cases. The Appellee has under date of July 15, 1949, designated all of the Exhibits except Exhibits Nos. 7, 8, 12, 13 and 14 as exhibits to be printed.

Exhibit No. 8, we understand, was read into the record and is a part of the testimony which should dispense with its printing.

All of said original exhibits have been forwarded by the Clerk of the United States District Court for the District of Idaho to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. There is attached hereto an affidavit of B. W. Davis which is made a part hereof.

Wherefore, your petitioner prays for an order dispensing with the printing of Plaintiff's and Appellant's Exhibits Nos. 7, 8, (in the event Exhibit 8 was not read into the record), 11, and Appellee's exhibits numbered 13 and 14. Appellant further prays that in accordance with the designation of the appellee, the cancelled check, Exhibit No. 12, be included in any order issued by the court dispensing with the printing of exhibits; and appellant prays that said original exhibits be considered by this court on appeal.

Dated this 19th day of July, 1949.

/s/ B. W. DAVIS.

Service acknowledged July 20, 1949.

So ordered:

/s/ WILLIAM DENMAN,  
Chief Judge.

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

United States Circuit Judge.



[Title of Court of Appeals and Cause.]

AFFIDAVIT OF B. W. DAVIS

State of Idaho,  
County of Bannock—ss.

B. W. Davis, being first duly sworn upon his oath, deposes and says:

That he is the attorney for Cecelia J. Wilson, appellant herein, and makes this affidavit on behalf of appellant for the purpose of securing an order dispensing with the printing of certain exhibits, all as stated in the application for order hereto attached;

That the exhibits which it is requested be not printed in the Application for Order attached present difficulties and would decidedly encumber the record and that the printing of such exhibits would be costly, all as will more particularly appear from an examination of said exhibits, and that such exhibits may properly serve the appellate court in their original form.

/s/ B. W. DAVIS.

Subscribed and sworn to before me this 19th day of July, 1949.

[Seal]     /s/ LAURA S. GOUGH,  
Notary Public, Residing at Pocatello, Idaho.  
My commission expires 9-18-50.

[Endorsed]:   Filed July 22, 1949.

No. 12,284

IN THE

United States Court of Appeals  
For the Ninth Circuit

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CECELIA J. WILSON,

*Appellant,*

VS.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a corporation,

*Appellee.*

On Appeal from the United States District Court for the  
District of Idaho, Eastern Division.

Honorable Chase A. Clark, Judge.

BRIEF FOR APPELLANT.

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B. W. DAVIS,

Pocatello, Idaho,

*Attorney for Appellant.*

FILED

JUL 11 1949

PAUL P. O'BRIEN,

CLERK



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IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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CECELIA J. WILSON,

*Appellant,*

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a corporation,

*Appellee.*

On Appeal from the United States District Court for the  
District of Idaho, Eastern Division.

Honorable Chase A. Clark, Judge.

**BRIEF FOR APPELLANT.**

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**JURISDICTION AND PLEADINGS.**

This action was commenced by Cecelia J. Wilson, appellant, who filed her complaint (T. 2-3) in which it was alleged that she was a citizen and resident of the State of Idaho and that the defendant, a corporation, was incorporated under the laws of the State of Missouri and that the matter in controversy exceeded ex-

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(Note): All numerals and numbers contained herein refer to the page of the printed transcript of the record, prepared under the direction of the Clerk of the United States Circuit Court.

clusive of interest and costs, the sum of \$3,000. This allegation was admitted by answer (T. 6). The District Court had jurisdiction under Section 1291, Chapter 83, Title 28, U.S.C.A. The District Court having had jurisdiction to hear the matter, the Circuit Court has jurisdiction of the appeal and appellant gave notice of appeal (T. 21) pursuant to Rule 73 of the Federal Rules of Civil Procedure and filed bond on appeal. (T. 21-22.)

The appellant brought her action to recover upon a \$5,000 accident policy issued to the deceased, Harry H. Wilson, her husband on the 21st day of August, 1937. The insured died on the 8th day of April, 1947. It was later determined and the Court found, Finding 11 (T. 15), that the policy was issued on the 24th day of August, 1937.

The appellee, by its answer and amendments thereto, admitted the issuance of the policy, denied that the deceased died through accidental means and denied the payment of premiums or compliance with the provisions of the policy by the insured, or the appellant and by separate and affirmative defenses alleged that the policy was a Missouri policy, became effective at Kansas City, Missouri and must be construed under the laws of that State and pleaded that the exceptions within the policy defeated recovery by the appellant, the surviving widow and that the deceased was operated on for hernia, a bodily infirmity, which contributed wholly or partly to his death and as an additional affirmative defense pleaded that notice of death and proof of loss was not furnished in accordance

with the terms of the policy. The answer is found T. 6-10.

The answer in paragraph II of the Third Defense (T. 9), pleads certain exceptions contained in the policy and in paragraph III, bases its defense upon the theory and proposition that the hernia was a bodily infirmity and that the operation for the same wholly or partly caused or contributed to the death of the insured and that for this reason it was within the exclusions or exceptions of the policy.

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#### **STATEMENT OF FACTS.**

This case was tried at the same time as the case of New York Life Insurance Company, a corporation, Appellant, vs. Cecelia J. Wilson, Appellee, No. 12,227, in the United States Circuit Court of Appeals for the Ninth Circuit.

The medical or expert testimony in the two cases is identical. In the instant case additional testimony was introduced with reference to the payment of the premiums upon the policy and the notification of the company subsequent to the death of the deceased and the furnishing of proofs of loss.

The appellant presented her evidence through oral testimony, that is by witnesses, who testified in open Court before the trial judge and who were cross-examined by attorneys for appellee. The appellee submitted its proof with the exception of the witness, Dr. Graves (T. 148) by deposition. Seven physicians and



surgeons testified—three of them orally in the presence of the Court and four of them, who gave their depositions on behalf of appellee.

Harry H. Wilson died on the 8th day of April, 1947, the day following a hernia operation. Appellant sought to prove and did establish to the satisfaction of the trial Court, that his death was accidental and that the same was an accident. That he did not die as a result of the hernia operation or from any bodily infirmity, sickness or illness, but as a result of the unexpected and very unusual and extraordinary effect that certain sedatives administered to him had upon him or caused, and that the same could not have been foreseen by any capable physician and surgeon; that the result was tragic and not to be expected.

The Court rendered his opinion referring specifically to the facts in the case of *Wilson v. New York Life Insurance Company*, which opinion the Court adopted as his opinion in the instant case, except as to two additional questions. (T. 12.) The opinion in the case of *Wilson v. New York Life Insurance Company*, appears T. 11-18 in that case and is printed in full and appended to this brief.

Subsequent to the opinion of the Court, Findings of Fact and Conclusions of Law were prepared by attorney for appellee, which the Court did not consider in accordance with the decision, and on the 20th day of May, 1949 (T. 14), the Court directed that counsel for plaintiff and appellant, make certain amendments to the Findings of Fact and Conclusions

of Law, which the Court had directed counsel for plaintiff and appellant to prepare. These Findings of Fact and Conclusions of Law as prepared by attorney for appellant were accepted by the Court and on May 31, 1949 (T. 20), after objection by attorney for appellee or defendant, that he did not want it to appear that he prepared the Findings and Conclusions even though judgment was entered in the appellee's favor, the Court ordered, as shown by the minute entry (T. 20), that the Findings of Fact and Conclusions of Law were prepared under the direction of the Court.

The Court found specifically upon each and every allegation of the pleadings and the different defenses and all of the issues submitted. The Court made fifteen Findings of Fact. (T. 15-18.) The Court found, Finding III, that Harry H. Wilson died of accident or by accidental death on the 8th day of April, 1947.

And the Findings also set forth specifically that the deceased was in ordinary good health, that he had the services of a skilled physician and surgeon, a man of broad experience and who was competent and experienced. That he gave no indication that he was not in good physical condition and the proper subject of a simple hernia operation. We quote Finding VI:

“That the patient appeared normal in every respect following said operation; did not suffer any shock and did not die as a result of said hernia operation.” (T. 16.)

The Court also specifically found:

“VII. That the death of Harry H. Wilson was caused by choking or coughing or violent snoring or by choking, coughing and violent snoring which caused and resulted in an embolism causing the death of the insured.”

“VIII. That the insured was given sedatives and opiates which caused the violent coughing, choking and snoring and which unexpectedly and accidentally caused the death of said insured.”

“IX. That the coughing, choking and snoring of the patient was extremely violent, extraordinary and not to have been foreseen and entirely beyond the experience of his attending physician in previous and similar conditions.”

“X. That the administration of opiates and sedatives was a reasonable and ordinary procedure to be followed by the attending physician; that the result thereof, causing the violent choking, snoring and coughing were tragical and out of proportion to the trivial cause and was an accident and resulted in death by accident.”

“XI. That the opiates and sedatives administered to the insured prior to his death were externally administered.”

“XII. That following the operation for hernia the opiates and sedatives were administered as medical treatment.” (T. 16-17.)

These findings of the Court were necessary and of course the same findings as the findings made in the case of *Wilson v. New York Life Insurance Company*. The Court found by Finding XIV that the policy con-

tained certain provisions. (T. 17.) This finding, of course, was a mere copying of that portion of the accident policy that contained the exceptions that would prevent the beneficiary from recovering where the insured had taken out an accident policy.

The Court, after making and adopting his finding on all of the material issues and the facts, and finding that the plaintiff or appellant had sustained the burden of proof and proved the death by accident, then adopted conclusions of law in which the Court, for some reason, felt called upon to adopt a conclusion in accordance with his opinion (T. 13), wherein he said:

“Regardless of how foolish it is to say that such an accident is sickness, that is the wording of the policy”

and adopted Conclusion No. V:

“In this cause the court feels it necessary to follow the wording of the policy that medical treatment after a hernia operation is to be construed as sickness, solely because it is so stated in the policy and for that reason plaintiff is not entitled to recover.” (T. 19.)

It will thus be seen that the Court did not find or conclude that the death of the deceased was:

“caused wholly or partly or the results of which are contributed to by bodily or mental infirmity, hernia \* \* \* or any \* \* \* medical or surgical treatment therefore,”

but that he apparently did conclude that medical treatment was to be construed as sickness.



It is absolutely clear from the Court's opinion and from the conclusion of law V, as above quoted, that he concluded that regardless of the legal or general meaning of the word "sickness" that the insurance company could, without causing any ambiguity whatever, call the medical treatment, sickness, and this is the sole and only ground upon which he entered judgment for the appellee. The appellee has not filed any cross appeal or taken any exception to the record or called for any additional parts to be printed except its designation on (T. 188) referring to certain exhibits.

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### **SPECIFICATION OF ERRORS.**

#### **I.**

The Court erred in failing to recognize and apply the rule of law applicable, that the appellant having proven and established that the death of the insured was by accident, that the burden of proof shifted to the appellee to establish, by a preponderance of the evidence, that the accident was within the exceptions of the policy and the Court having concluded that the appellee was entitled to prevail, solely because of the reference to "sickness" in the exclusion, should have required the appellee to establish that the sickness existed and had affected the deceased prior to the time of the accident.

#### **II.**

The Court having found that the death was accidental and within the terms of the accident policy,



that it was caused by violent and external means, was bound to construe the policy most favorably to the beneficiary, which the Court failed to do.

### III.

Taking into consideration the entire exclusion clauses and provisions of the insurance policy, the same clearly show an ambiguity and the word "sickness" in the policy is used and referred to in such a manner that it is not only ambiguous to the layman, but a reading and consideration of the Court decisions and authorities clearly show that it is ambiguous to the Courts and the trial Court erred in not resolving any doubt about the matter in favor of the appellant.

### IV.

The Court erred in not giving to the language and provisions of the insurance policy the usual and ordinary construction of the same and erred in giving to the word "sickness", an unusual meaning and construction. That the word "sickness" has a well defined meaning generally and legally and that the giving of a sedative or the taking of a pill is not "sickness".

### V.

That the Court having found that the death was purely accidental, tragical and out of proportion to the trivial cause, should have entered judgment for the appellant.

## POINTS AND AUTHORITIES.

## I.

The case is to be determined by the law of the State of Idaho.

*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 114 A.L.R. 1487.

## II.

The death of the deceased was clearly accidental under the Idaho law as found by the Court.

*Teeter et al. v. Dairymen's Coop. et al.* (Ida.), 190 Pac. (2d) 687;

*Rauert v. Loyal Protective Insurance Co.* (Ida.), 106 Pac. (2d) 1015.

## III.

The Idaho Courts have repeatedly held that insurance policies must be construed strongly against the insurer and in favor of the insured and that where there is any question as to the construction that can be given, the wording in the exclusions in a policy must be so construed as to permit recovery.

*Jensma v. Sun Life Insurance Co.*, 64 Fed. (2d) 457;

*Rauert v. Loyal Protective Ins. Co.* (Ida.), 106 Pac. (2d) 1015;

*O'Neill v. N.Y. Life Ins. Co.* (Ida.), 152 Pac. (2d) 707;

*Maryland Cas. Co. v. Boise Street Car Co.* (Ida.), 11 Pac. (2d) 1090;

*Kingsford v. Bus. Men's Assurance Co.* (Ida.), 68 Pac. (2d) 58;

- Sweaney & Smith et al. v. St. Paul Fire Ins. Co.* (Ida.), 206 Pac. 178;
- Watkins v. Fed. Life* (Ida.), 29 Pac. (2d) 1007;
- Stout v. Continental Life Ins. Co.* (Ida.), 291 Pac. 1073;
- Manufacturers Acc. Indem. Co. v. Dorgan*, 58 Fed. 945;
- Burr v. Com. Trav. Mut. Acc. Ass. Co.* (N.Y.), 67 N.E. (2d) 248, 166 A.L.R. 762 (exhaustive note is found in the discussion of this question at page 473 of 166 A.L.R.);
- Beile v. Trav. Prot. Ass. Co.* (Mo.), 135 S.W. 497;
- Buhl v. Kans. Life Ins. Co.* (N. Mex.), 250 Pac. 635;
- Sallie Newsom v. Commercial Cas. Ins. Co.*, 137 S.E. 456;
- Int. Nat. Life Ass. v. Francis* (Tex.), 23 S.W. (2d) 282;
- Huntington Cab Co. v. Fed. & Cas. Co., Inc.*, 63 Fed. Supp. 939, citing 73 A.L.R. 414;
- Georgia Casualty Co. v. Mills*, 127 So. 555;
- Sentinel Life Ins. Co. v. Blackmer*, 77 Fed. (2d) 345, cert. denied, 80 L.Ed. 427;
- Bankers Health & Acc. Co. of Am. v. Shadden*, 15 S.W. (2d) 704;
- Trav. Ins. Co. of Hartford v. Diner*, 75 Fed. (2d) 3;
- Meyer v. Fed. Cas. Co.* (Ia.), 65 N.W. 328;
- Browning v. Equitable Life Ass. Soc. of the United States* (Utah), 72 Pac. (2d) 1060

(this case cited and approved by the Supreme Court of the State of Idaho in *Rauert v. Loyal Protective Assur. Co.*, supra).

(The Idaho Courts having so strongly and definitely held for liberal construction of all insurance policies for the benefit of the insured, any decisions from other Courts upon this phase of the matter are in point and competent authority in this case.)

#### IV.

The appellant having established that the death was by accident and the compliance with the general terms of the policy, the burden shifted to appellee to establish its defense and to prove the same by a preponderance of the evidence.

*O'Neill v. N.Y. Life Insurance Co.* (Ida.), 152 Pac. (2d) 707;

*Browning v. Equitable Life Assurance Society of the United States* (Utah), 80 Pac. (2d) 348.

#### V.

Where a policy provides in its exclusions that recovery cannot be had if death results wholly or partly, or directly or indirectly from, or is contributed to by bodily or mental infirmity, or sickness or disease, such provisions are construed by the Courts to mean infirmity, illness, disease or sickness existing prior to the accident and that would have caused the death without the accident and not infirmity or sickness that occurred subsequent thereto and that the fact of the existence

of some infirmity or illness or sickness, is not the contributing cause or does not contribute to the death unless it is the proximate cause, even though the accident accelerates such sickness or illness.

*Browning v. Equitable Life Assurance Society of the United States*, 72 Pac. (2d) 1060 (on rehearing, 80 Pac. (2d) 348 (Utah));

*Silverstein v. Met. Life Insurance Co.* (N.Y.), 173 N.E. 914;

*Bohaker v. Trav. Ins. Co.* (Mass.), 102 N.E. 342;

*French v. Fidelity & Casualty Co.* (Wisc.), 115 N.W. 869;

*Carey v. Preferred Accident Ins. Co. of N. Y.* (Wisc.), 106 N.W. 1055;

*Ward v. Aetna Life Insurance Co. of Hartford* (Neb.), 118 N.W. 70;

*Nat. Benefit Ass'n v. Grauman* (Ind.), 7 N.E. 233.

See Exhaustive Note, 108 A.L.R., commencing at page 21.

## VI.

Disease by the terms of the policy is synonymous with sickness.

*Browning v. Equitable Life Ass. Society of the United States*, 80 Pac. (2d) 348;

*Logan v. Prov. Savings Life Ass. Soc.* (W. Va.) 50 S.E. 529;

*Cady v. Fid. & Cas. Co.* (Wisc.), 113 N.W. 967.



## VII.

The guide in cases of this character is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract.

*Bird v. St. Paul Fire & Marine Ins. Co.* (N.Y.), 120 N.E. 86;

*Goldstein v. Standard Accident Insurance Co.* (N.Y.), 140 N.E. 235;

*Van Vechten v. American Eagle Fire Ins. Co.* (N.Y.), 146 N.E. 432, 38 A.L.R. 1115.

## VIII.

The Circuit Court of Appeals will, where the matter has been tried before the Court, and the conclusions of law are inconsistent with the findings, review the matter, and if the conclusions are inconsistent, order such judgment as is proper.

*Jensma v. Sun Life Insurance Co.*, 64 Fed. (2d) 457.

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**ARGUMENT.**

The appellant recognizes that if the Findings of Fact support or justify the conclusion of law complained of and if there is any finding or findings supported by evidence and the findings are not contradictory, that the Circuit Court will uphold the judgment of the trial Court.

The appellant's position is that the findings of fact do not justify the Court in concluding that the plaintiff was not entitled to recover and takes the position

that under the findings made by the Court, which, we take it, are binding and conclusive on this appeal, that the Court should have construed the policy strongly in favor of the insured in accordance with the settled rule of law in Idaho. And in accordance with this Court's decision in *Jensma v. Sun Life Insurance Company*, 64 Fed. (2d) 457, and the appellant feels that the *Jensma* case is strongly in her favor and that it clearly indicates that the Circuit Court will, under the existing conditions, consider this matter and right the mistake made by the trial judge.

The only basis upon which the appellee can possibly contend, under the Idaho law, that the Court's findings justify the judgment or the conclusion of law is that the following language is not in any way ambiguous or is not subject to more than one construction, namely:

“Such hernia \* \* \* medical or surgical treatment to be construed as sickness,”

and that such provision is clear and unambiguous to the average person or layman who secures insurance.

In order to determine whether the appellee can successfully so contend, it is necessary to construe and consider the entire part of the exceptions. The exceptions refer to death being caused wholly or partly or the results of which are contributed to by bodily or mental infirmity or hernia or any medical or surgical treatment therefor. This part of the exception or exceptions in the policy clearly does not prevent a recovery in this case and clearly does not say that the

insurer shall not be liable, if death, after an accident, should be the result of sickness. There is no dispute that an admitted accident could cause a sickness and that the company would be liable. It is the appellant's serious and sincere contention that that part of the exception which states that hernia, medical or surgical treatment is to be construed as sickness is ambiguous; that it does not in any way clarify the preceding exceptions and that the exceptions in the policy do not in any way make sickness an exception. The most that can be said for the last statement or sentence that is tacked on to the exceptions is that it is merely explanatory and attempts to define something as sickness that is not and was not sickness at all either from a legal standpoint or from any other standpoint.

To say that such a provision is clear and conclusive and is a direct exception, of course, is to say that such language means that if a man is treated for an accident or if he is treated for hernia, no matter what the accident is, that the treatment was sickness and that therefore he cannot recover.

If such reasoning can be sustained, then the insurer can provide that a broken leg is to be construed as sickness and then argue that one cannot recover for sickness even though it is not an exception of the policy and that this is clear and unambiguous.

Naturally, anyone purchasing an accident policy would expect that if he or his beneficiary were not to be compensated for the accidental breaking of a leg, that the insurer would say that recovery could not be

had in case of a broken leg and that they would not try to say in unusual and unexpected terms that a broken leg was to be considered sickness. This is merely "beating around the bush."

If in the present proceeding, sickness had been used as an exception it would have been placed with the exceptions and not in the explanatory matter and the policy could and should have provided that the beneficiary could not recover for death following any hernia operation.

That part of the policy which insures against accident which appears on the first page of the policy and is brought clearly to the attention of a policy holder provides:

"The accident insurance under this policy covers all bodily injuries, fatal or otherwise \* \* \*"

The provisions, conditions, limitations and exceptions in the policy are found upon a different page and different type and do not follow the policy statement that the policy "covers all bodily injuries, fatal or otherwise."

Counsel realizes that the exceptions are a part of the policy and that if they are absolutely clear and no ambiguity appears therein, and they are not subject to more than one construction and that they are clear and understandable, that they will be enforced.

Counsel is frankly at a loss and unable to reconcile the opinion in the case of *Wilson v. New York Life Insurance Company* with the opinion in the instant



case as handed down by the honorable and able district judge. We fail to see how in view of his first opinion or decision wherein he sets out that the first part of the policy gives and the latter part takes away and that Idaho will follow the humane and just rule in order to do justice in cases of this kind he could then base his conclusion of law upon what he refers to as something "foolish", and how, where the Court feels that it is "foolish" to call an accident, sickness, that he can say that an accident is sickness, when he finds that it wasn't sickness and when he finds directly that the death was not the result of any bodily infirmity or surgical treatment and that the death was effected solely through external, violent and accidental means as he found in the case of *Wilson v. New York Life Insurance Company*. A reading of the policy in that case discloses that while the insurer did not attempt to give a definition as to what disease or illness or sickness was, that the policy provides that there shall be no recovery if death is caused:

"directly or indirectly from infirmity of mind or body, from illness or disease, \* \* \*".

The Courts do not make any distinction between sickness and disease and if medical treatment after an operation, is to be construed as sickness, then certainly it should be construed as a disease, and surely an insurance company cannot give any foolish, unusual or unheard of meaning to a word in a policy to defeat recovery by the insured. If an insurance company can in such a subtle manner call something that



is not sickness at all, sickness, then they could define a hernia as a "bowel obstruction" or a broken bone as "pneumonia".

We urgently submit that if such an unusual thing as this may be done and is to be sanctioned by the Courts, then the definitions and the ordinary meanings and use of words is of no benefit or protection whatever, either to parties to contracts or to the Courts, but may become a trap.

We believe that the definition of sickness as found in Webster's International Dictionary must be fairly close to what, not only the layman, but the judiciary understands sickness to mean. Sickness is, without quoting the entire definition, generally considered as:

"1. Affected with disease; ill; indisposed. Simon's wife's mother lay sick of a fever. Mark 1-30;

2. Affected with, or attended by nausea; inclined to vomit; as, sickness in the stomach; a sick headache;

3. Disordered; impaired; imperfect.

Syn.: sick, ill, have been employed as in the best English usage with little distinction. There is at present a strong tendency in Great Britain to confine sickness to the sense of nauseated. See Disease."

It is urged on this appeal that to give to the word "sickness" or that to provide by an exception in the policy that the word "sickness" means something entirely different than any definition that can be found

for the word in any recognized legal or other dictionary, is in itself ambiguous, contradictory, likely to confuse and subject to more than one construction and that under the rule of law requiring a strong construction against the insurance company and requiring the policy to be construed most favorably toward the insured requires the Courts not to, as the honorable trial judge said, accept something that seems foolish, but to accept what is common sense and logical and that the matter must be construed most favorably to the appellant and that she is justly entitled, in view of the findings of fact adopted by the Court, to recover, and we urge that the findings of fact do not support the conclusion of law that accidental death, caused by the giving of sedatives through external means, is within the exception of the policy that it is sickness or that the policy in any way prescribes or sets out sickness as an exception under the circumstances of this case.

It is clear that the appellee has not shown and did not show that the death of the deceased was due to any bodily infirmity, either wholly or partly or directly or indirectly. The Court having found against the appellee on that theory and the appellee being bound in this particular case under the liberal construction rule by not only the Idaho cases but the case of *Browning v. The Equitable Life Assurance Society of the United States*, 72 Pac. (2d) 1060, and the same case on rehearing in 80 Pac. (2d) 349, any disease or infirmity existing in an insured where an accident follows and there is no cause or connection between

the injury or accident and the preexisting disease, the accident is considered as the sole cause.

In *Browning v. Equitable Life Assurance Society*, supra, the Court also held:

“An existing disease does not mean a temporary disorder or derangement of the body organs, system, or functions, nor a tendency or susceptibility to disease, but a chronic or definite affliction such as would be embraced in the common understanding and meaning of the term ‘diseased’ or ‘sick’.”

The Court having specifically found that the hernia operation was not the cause of the death, it cannot be claimed that sickness referred to in the policy and in the Court’s opinion and conclusions of law, referred to any sickness of the insured at the time of the operation. If the insured was sick or had any sickness, that sickness followed the violent coughing, choking and snoring and was a sickness that followed the accident. Snoring and coughing were unusual and unexpected and accidental and continued until they caused the death of the insured.

The giving of a sedative is not sickness. Who will say that taking an aspirin is sickness, and the sickness here, if there was such a thing, clearly developed as a result of the accident. We do not concede or believe that there ever was any sickness of the deceased, as that term is commonly used and understood, but if there was and if the insurance company can say that giving a man a sedative is a sickness, then the sickness could not have developed until after the sedative was

administered and the sedative having caused the unusual and unexpected violent reaction, the sickness followed the accident and the plaintiff or appellant can and should recover.

The appellee never thought or claimed that sickness caused the death of deceased. Their third defense, paragraph III (T-9), is:

“That shortly prior to the death of Harry H. Wilson, he was operated on for hernia and that such bodily infirmity and operation wholly or partly caused or contributed to his death in such manner as to be within the exclusions of the said policy.”

All of the appellee's medical testimony was directed to the proposition that if there had been no hernia there would have been no operation and if there had been no operation, there would not have been a death and their whole defense and testimony was directed to the proposition that the hernia was a bodily infirmity and that the operation at least partially contributed to the death of the deceased. None of the experts ever construed the matter as sickness, but the experts for the appellee contended that the death was foreseeable, to be expected and that it was the result of the hernia operation.

This is directly contradicted by the expert witnesses of the appellant.

Counsel for appellant appreciates that the burden is upon him and that it is his duty to reasonably and fairly analyze the decisions and to endeavor to aid and



assist the Court in arriving at a fair and just decision in this matter regardless of the outcome. However, counsel frankly admits that he is unable to understand many of the different distinctions drawn by the different Courts. Perhaps the Courts and other counsel may have the ability to do so, but it surely would not aid this Court to cite and refer to the literally hundreds of decisions concerning accident policies. The case surely will be decided upon what the Appellate Court understands to be the law of the State of Idaho and its decision in the case of *Jensma v. Sun Life Ins. Co.*, supra, construing the laws of the State of Idaho. The *Jensma* case has been cited and re-cited in many jurisdictions and by the Appellate Court, but we do not believe it would lessen the work of this Court or aid the Court to cite all of the cases approving the decision and we do not find the Appellate Court has in any way modified the decision in this case.

And when the members of a Court such as the Supreme Court of the State of Utah are so far apart upon the question of construction of a policy, very nearly identical with the policy in question, how can it be said that there is not an ambiguity in such policy and how can it be said that under the rule as laid down by the Supreme Court of the State of Idaho and under the laws of Idaho, that the ambiguity is not so marked and that the policy is not so susceptible to different constructions that it shall not be construed in the appellant's favor. In the *Browning* case in the original opinion, the chief justice concurred in the opinion. On rehearing he stated that because of the



violent difference in the thinking of the members of the Supreme Court, he thought a rehearing should be granted and dissented in the refusal of the majority to grant a rehearing.

In the instant case the burden was upon the defendant to prove that the exceptions defeated recovery. The *Browning* case has been approved by the Idaho Supreme Court and has been quoted from in different decisions. And this decision in the second opinion, 80 Pac. (2d) 348, sets out in clear and convincing language what burden is upon the plaintiff and what burden is upon the defendant.

The Court's attention is respectfully called to the fact that the accident policy in *Brown v. Equitable Life Ass. Society of the United States*, supra, contains almost the identical provisions of the present policy and we quote from the opinion on the rehearing:

"Subdivision 'A' provides, inter alia, that 'disease', when used in the policy, means 'sickness'. In the opinion rendered, we discussed this question and held that 'disease' means a pre-existing disease and not a mere bodily condition, temporary disorder, or departure from normal, not amounting to a disease or sickness within the connotation of that term in common parlance."

One is not justified in saying that any two instruments are identical unless they have been compared word for word, or one is a copy. However, we believe that the provisions of the policy in the *Browning* case are so nearly identical with those in the instant case,

especially, insofar as the exceptions are concerned, that no distinction can be drawn between them.

And attention is called to page 351 of 80 Pac. (2d) (under the subdivisions 4 and 5 of the opinion). It will be found that the policy, among its exclusions, provides that it:

“Shall not cover accident, injury, disability, death or other loss caused directly or indirectly, wholly or partially, by bodily or mental infirmity, hernia, \* \* \* or by any other kind of disease”,

and then defines “disease” as meaning “sickness” as above quoted.

This same Court on rehearing, in referring to its rule of construction referred to *Warwick v. Knights of Damon* (Ga.) 32 S.E., 951 and quoted as follows:

“And especially is this rule of construction to be adhered to and applied in cases where the insured has prima facie established a right to recover under the terms of the policy, and the company is seeking to defeat such a liability by showing that the act complained of is within one of the exceptions reserved in the contract as a defense to an action on the policy. All such exceptions are to be construed strictly against the company, and liberally in favor of the insured.”

In the original opinion in 72 Pac. (2d) 1075, the Court in quoting from 38 A.L.R. 1115 supra said:

“A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Appolo or a Hercules.”

Quite a strong argument can be and is repeatedly made in this type of case, that there is really no such thing as accident and in a sense, this is true. In one way of approaching the matter it can be reasoned that death being inevitable, it is not an accident; that it follows naturally from some cause that was set in motion that could have been avoided by the use of proper care or by proper foresight. However, if this were the law, then there could be no such thing as an accident policy and if accident policies are to be written, then they must be written to cover those things that are unusual and unexpected happenings and that come within the ordinary meaning of the word "accident".

The Court in the *Browning* case, 72 Pac. (2d), at page 1075, in discussing things that could be sickness or infirmities or that might contribute to death, said:

"All of us, at all times, probably have in our systems microbes, germs, and bacteria of many diseases—pneumococcus, streptococcus, staphylococcus, tuberculosis, and influenza bacillus, ad infinitum—but which in the normal course of our lives we may successfully ward off. Because in warding off such possible diseases we may be in a weakened condition of strength and resistance, we may the more readily succumb to an injury accidentally sustained by external violence. The injury, not the presence of the disease germs in the system, would still be the cause of death or disability."

I have just completed a very careful reading of the testimony of Doctors Graves, Beeman, Swindell, Pit-

tenger and Stewart. We find that the word "sickness" is not used or employed by either counsel examining them or by the witnesses. Disease is only referred to in connection with the venous system and that sparingly. This testimony is found T. 148-183. Each of these witnesses did not believe or diagnose the cause of death as pulmonary embolism and each of these witnesses were unable to tell the cause of death without an autopsy.

They testified that the hernia was a contributing cause to the death, which was purely a conclusion upon their part, under questions directed to them and the question of whether or not the hernia was such a contributing cause as barred recovery under the policy, is both a question of law and of fact that was determined adversely to the conclusion of these expert witnesses. The appellee's expert witnesses did not pretend to indicate or to say what "sickness" was or to try and show that either "illness" or "disease" in any way contributed to the death of Harry H. Wilson.

Dr. Brothers was the only witness who testified concerning whether or not bodily infirmity was a disease:

"Q. And every one of those go back to a bodily infirmity?

A. Injuries and prior operations you did not call them diseases."

It will be observed that the expert witnesses for the appellee take the position that the deceased did not die of pulmonary embolism and at the same time state



the pulmonary embolism is to be expected and that it was to be foreseen. The testimony of the different experts for the appellee are not in accord—some of the experts testifying that there would be more likelihood of a post operative death from embolism in a man 61 years of age than in a younger person, yet Dr. Stewart testified:

“Q. Assuming that Mr. Wilson was 61 years of age at the time of his death, what would you say as to whether post operative pulmonary embolism would be more probable in his case than that of a younger person?

A. No, I do not think so, because it occurs at all ages.”

We quote this testimony for the purpose of showing that there is so much diversity of opinion among the witnesses and in the authorities that under the Idaho rule of law, the Federal Courts cannot consistently do other than construe these matters in favor of the appellant.

It is most respectfully urged that this cause should be reversed and judgment entered for the appellant.

Dated, Pocatello, Idaho,

September 26, 1949.

Respectfully submitted,

B. W. DAVIS,

*Attorney for Appellant.*

**(Appendix Follows.)**







## Appendix

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*In the United States District Court, District of Idaho  
Eastern Division*

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Cecelia J. Wilson,

Plaintiff,

vs.

New York Life Insurance Company  
(a corporation of New York),

Defendant.

No. 1463

February 2, 1949

### OPINION

Ben. W. Davis, Esq., of Pocatello, Idaho,  
Attorney for the Plaintiff,

A. L. Merrill, Esq., Pocatello, Idaho,

J. L. Eberle, Esq., Boise, Idaho,

Attorneys for the Defendant.

CLARK, District Judge.

The Plaintiff Cecelia J. Wilson brought this action to recover for the alleged accidental death of her husband, Harry Wilson.

Harry Wilson, the deceased, was a resident of the State of Idaho at the time the defendant New York Life Insurance Company, a corporation of New York, on or about the 19th day of May, 1828, issued its certain policy of insurance, being policy No. 10255251, the policy insuring the insured for \$5,000.00 payable

to his beneficiary upon proof of his death and \$10,000.00 or double the face of the policy if death resulted from accident. This action is for the recovery of the double indemnity of \$5,000.00 for the alleged accidental death.

The policy provided for double indemnity if "the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means \* \* \*". "Double indemnity shall not be payable if the insured's death resulted \* \* \* directly or indirectly from illness or diseases or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury \* \* \*"

The insured died on the 8th day of April, 1947, from "acute pulmonary embolism". This is defined at page 12 of the transcript of the testimony, by Doctor O. F. Call, attending physician at the time of Mr. Wilson's death, as a "foreign substance or piece of a clot flowing in the blood stream which goes through the heart, through the pulmonary artery to such a place that it can't go any farther and lodges in the pulmonary artery or branch of it. It can be a clot of blood, a fatty or foreign substance."

The circumstances preceding Mr. Wilson's death as disclosed by the evidence, are as follows: He was in ordinary good health of the average man; he was about sixty years of age; he was troubled to some extent by high blood pressure. He had undergone an operation some years ago for a bowel obstruction; the record does not disclose when this operation was per-

formed but it was prior to an operation for hernia that was performed some four years prior to his death. On the morning of April 7, 1947, he was again operated upon for recurrent inguinal hernia. Immediately following the operation he was returned to his room in the hospital in apparently good condition. After the operation on the morning of April 7, opiates and sedatives were administered, which were a part of standard and recognized treatment. The opiates so administered caused deep heavy snoring, choking and coughing and although Mr. Wilson was a heavy snorer when sleeping under natural conditions, this medication caused the choking and coughing and snoring to become more violent, causing the pulmonary embolism from which death resulted at 5 o'clock A.M., April 8, 1947, about twenty hours after the operation. The result of the administration of the opiates was entirely unforeseen and unexpected; there was nothing to indicate, at the time of their administration, that he would develop this extraordinary condition snoring or heavy breathing and the coughing and choking causing the embolism. Doctor Call testified that in his experience in operations this condition that developed in reference to the snoring, choking and breathing was most extraordinary and not to be expected or foreseen; the record discloses the following questions and answers in the testimony of Doctor Call:

Q. I call your attention to the definition in Webster's International Dictionary of accident; that defines an accident as "a befalling; an event that takes place without one's foresight or expectation, an undesigned, sudden and unexpected event; chance; con-



tingency, often an undesigned and unforeseen occurrence of an afflictive or unfortunate character, a casualty, a mishap, as, to die of accident." Now, Doctor, I will ask you if the event of the patient's death under the circumstances, in your opinion, was an event that took place without foresight and expectation?

A. It was.

Q. Was it undesigned, sudden and unexpected?

A. It was.

Q. Was it a chance?

A. It was.

Q. Due to contingency?

A. It was.

Q. Was it an undesigned and unforeseen occurrence of an afflictive or unfortunate character?

A. It was.

Q. Was it a casualty?

A. It was.

Q. Was it a mishap?

A. It was.

Q. Did he die in your opinion, by accident?

A. He did.

Q. Now, with reference to this condition, this unexpected condition that occurred there with reference to the choking and snoring, was that an event that took place without foresight and expectation?

A. That's right.

Q. Was it undesigned?

A. It was.

Q. Was it a chance?

A. It was.

Q. A contingency?

A. Yes sir.

Q. Was it an unforeseen and undesigned occurrence of an afflictive or unfortunate character?

A. It was.

Q. And was it a mishap?

A. Yes sir, certainly.

Q. In your opinion it was the direct cause of the man's death. The main cause, and the principal and moving cause of the man's death?

A. Yes sir.

The deceased died unexpectedly, there was nothing in his operation, and he gave no indicative history or evidence that the calamity that befell him was likely to happen.

Plaintiff having established the death was accidental the burden shifts to the defendant and it must allege and prove that recovery is barred by the limitations qualifying the general clause hereinbefore set forth.

“Where the insurer seeks to avoid liability by reason of an alleged breach of the condition of the policy, the burden rests upon it to show such breach; and, where it seeks to avoid liability on the ground that the accident or injury is within one of the exceptions in the policy, the burden rests upon it to prove facts bringing the case within the exception.” *O’Neil v. New York Life Insurance Co.*, 152 Pac. (2d) 707 at page 711.

In meeting this burden it must be remembered that the limitation clause is to be construed most favorable

to the insured. The rule is that insurance policies must be construed strongly against the insurer and in favor of the insured and that where there are two constructions that may be placed upon the meaning of an accident policy, one of which will permit the insured to recover and the other not permitting such recovery that the policy must be construed so as to permit recovery. The most widely cited rule is the one set forth by Ex-president and Former Chief Justice Taft (Court of Appeals 6th Circuit), in the case of *Manufacturer's Accident Indemnity Co. v. Dorgan*, 58 Fed. 945, he said: "It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the Courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which Courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer." This statement has been cited with approval by the Court of Appeals of this, the Ninth Circuit in the case of *Jensma v. Sun Life Assurance Co., of Canada et al.*, 64 Fed. (2d) page 457.

Recovery in this case depends on the limitation in the policy hereinbefore set forth. The term *Accidental means* in some jurisdictions has been held to clearly limit the policy's meaning to cause alone, however the better rule and the rule followed in this jurisdiction is

that the term "accidental means" and the term "accidental results" and "accidental death" are regarded as legally synonymous. *Jensma v. Sun Life Assurance Co., of Canada et al.*, supra. *Ranert v. Loyal Protective Insurance Co.* (1940) 61 Idaho 677, 106 Pac. (2d) 1015; *O'Neil v. New York Life Insurance Co.*, supra.

We have here a result that was unforeseen, the opiates were introduced into the body of the insured without any thought that such a result would follow, the result being unforeseen and wholly unexpected and unanticipated.

Death is inevitable, every man lives more happily and secure if he feels that he has insurance to take care of those who are near and dear to him, after he has departed this life. It is well known, as suggested in the case of *Ranert v. Loyal Protective Insurance Co.*, supra, that the ordinary man is not versed in the construction of contracts. He simply says to the life insurance agent, "I want this security for my family" he does not prepare, nor does he have his lawyer prepare the written contract; he pays the money for this insurance. The contract is prepared beforehand by the insurer. I think it can be said without contradiction that the provisions of the policy are not discussed, they simply tell the agent the protection they desire. The policy is all written out in printed form and following the main provisions of the policy the limitations are provided. In other words, the first part of the policy gives and the second part of the policy takes away, and the ordinary person who is not trained



to interpret contracts is generally not in a position to understand the details, terms and meanings of the limitations. In fact, as is so often said, the insured seldom sees the policy until it has been issued and delivered to him and then after he receives it he puts it in his desk or safe and the first time it is read is by his beneficiaries after his death. Many of its terms and all of its defenses and super limitations are difficult to understand. If justice is to be done the Courts must adopt a rule of construction in favor of the insured to accomplish the purpose for which the insurance was taken out and for which the premiums were paid.

This Court follows that rule not only because it is the rule in this jurisdiction but because it is the just rule.

The Court is of the opinion that the defendant has failed to bring itself within the exception relied upon to defeat recovery and is further of the opinion that the result that followed the administration of the opiates was not natural or probable and should not reasonably have happened and under all the circumstances the result was tragically out of proportion to the trivial cause, and that the plaintiff is entitled to recover under the terms of the policy.

The plaintiff's counsel may prepare the necessary findings, conclusions and judgment to conform with this opinion, copy will be served on counsel for the defendant and the original presented to the Court for approval.



IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

CECELIA J. WILSON,

*Appellant,*

vs.

BUSINESS MEN'S ASSURANCE COMPANY OF  
AMERICA, a corporation,

*Appellee.*

---

**Brief of Appellee**

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On appeal from the United States District for the District of  
Idaho, Eastern Division

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HONORABLE CHASE A. CLARK, *Judge*

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A. L. MERRILL

R. D. MERRILL

W. F. MERRILL

*Attorneys for Appellee* **PAUL P. O'BRIEN,**

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**FILED**

OCT 27 1949

CLERK



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FOR THE NINTH CIRCUIT

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A. L. MERRILL

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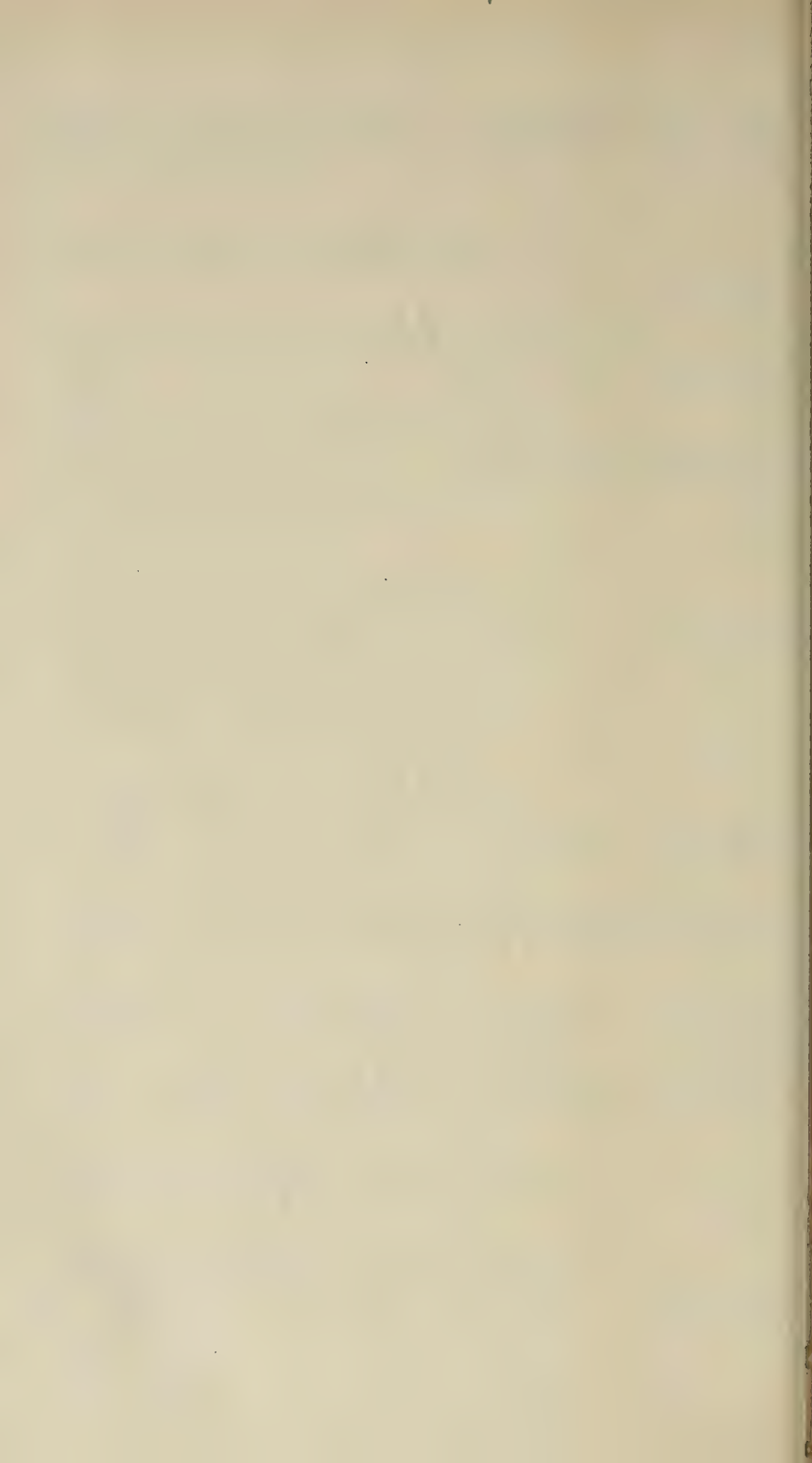
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*Appellee.*

---

**Brief of Appellee**

---

STATEMENT OF THE CASE

The appellee respectfully suggests that a statement of facts additional to those recited by the appellant will be helpful in a consideration of this case.

On August 24, 1937, the appellee issued at its office in Kansas City, Missouri, an accident policy, by the terms of which it agreed to insure Harry H. Wilson against loss resulting directly and independently of all other causes from bodily injuries sustained during the term of the policy and effected solely through accidental means, subject however to the provisions, conditions, and limitations contained therein.

(Note) : All numerals and numbers contained herein refer to the page of the printed transcript of the record, prepared under the direction of the Clerk of the United States Circuit Court.

It is not in any sense a life insurance policy, but purely an accident policy, and the premiums, as will be observed from the policy itself, are decidedly less than for life insurance.

This policy further provides that it should become effective at 12:00 o'clock noon (Standard Time at the residence of the insured) on the date of its issuance. It was signed in Kansas City, Missouri, and thereupon became effective at that place and time.

Harry H. Wilson, aged sixty-one, died at Pocatello, Idaho, on April 8, 1947, following an operation for recurrent inguinal hernia. About four years prior he sustained an operation for hernia at Mayo's Clinic (T. 34). He had also been previously operated on for a bowel obstruction (T. 86). Following the operation sedatives were given in the usual and ordinary way. Dr. Call, the attending physician, knew of the previous operations and that Mr. Wilson was accustomed to snoring and coughing (T. 34). The insured snored and coughed, and this was thought by his doctor to have resulted in embolism, causing his death. It is undisputed that the hernia, and the operation therefor, was a contributing cause of death (T. 78, 83, 86, 157, 164, 172, 182).

The appellant filed suit for the recovery of the amount stated in the policy, alleging among other things, the execution and delivery of the policy, the death of the insured, and that death was "caused by accidental means" (T. 2-3). The appellee answered and among other things admitted the execution and delivery of the policy, but denied that death was "through accidental means within the coverage" thereof, and

alleged that the policy was written and signed in Kansas City, Missouri, became effective at said place, and must be construed under the laws of the State of Missouri. In its answer the appellee further alleged the provisions of said policy with respect to coverage and limitations and that the deceased was operated on for hernia and that such was a bodily infirmity and wholly or partly caused or contributed to the death in such manner as to be within the exclusions of the policy (T. 7-10). The evidence supporting appellee's position is without substantial conflict as will be hereinafter pointed out. The Court made certain Findings of Fact and Conclusions of Law, and concluded that such hernia and the medical or surgical treatment therefor must be construed as sickness under the terms of the policy and that the appellant was not entitled to recover, and judgment in favor of the appellee was entered accordingly.

This case was tried at the same time as the case of Wilson vs. New York Life Insurance Company, heretofore appealed, with some additional evidence adduced by the appellant and appellee, and the trial court in rendering its opinion in the case under consideration referred to the New York Life case and adopted its opinion therein except for certain differences between the two policies, and appellee's contention that this policy must be construed pursuant to the law of Missouri (T. 12, 13). Because of the differences in the policies the trial court held in favor of the appellee. In this opinion the Court requested counsel for the defendant to prepare Findings, Conclusions, and Judgment (T.13). These were prepared but not followed by the Court, who thereupon ordered

counsel for plaintiff to prepare the same, and upon hearing directed plaintiff's counsel to amend "his proposed findings of Fact and Conclusions of Law" (T. 14). As the result of said hearing the Court ordered that the recrods show that the same were prepared under direction of the Court and neither counsel was responsible for the preparation of the same (T. 20).

After this appeal had been taken application was made by the appellant to dispense with the printing of certain exhibits, which application was granted, and said exhibits, some of which are hereafter referred to, are before the Court in the original form.

The appellee takes the position that the judgment of the trial court is correct and should be affirmed. It further takes the position, however, pursuant to authorities hereinafter cited, that certain other Findings and Conclusions should have been in favor of appellee and that these may be presented without the necessity of a cross-appeal or cross-assignments.

### SUMMARY

The evidence adduced in the court below proved without substantial dispute that the death of Harry H. Wilson was caused wholly or partly or contributed to by a hernia or medical or surgical treatment therefor. This must be construed as sickness under the limitations of the insurance policy and death resulting therefrom excluded. The policy is unambiguous nad the finding of the trial court and the judgment entered thereon must be sustained.

A policy of insurance when unambiguous must be enforced

in accordance with its terms, and its contract cannot be impaired by loose and ill-considered interpretations.

The appellee without a cross-appeal may urge errors of the trial court which, if corrected, would further support the judgment. This judgment can be supported also upon the theory that the death was not an accident nor within the primary coverage of the policy, and furthermore that the policy was a Missouri contract and should be construed in accordance with the law of Missouri, which, under the facts herein, would, upon any theory, require judgment for the defendant.

## POINTS AND AUTHORITIES

### I.

Language used in an insurance policy should be given its ordinary and usual meaning, and when unambiguous must be enforced like any other contract.

Tennant Finance Corp v. Maryland Cas Co., 7 Cir. 86 F. 2d 789.

Travelers Insurance Co. v. Springfield Fire & Marine Insurance Co., 8 Cir., 89 F. 2d 757.

Carpenter v. Continental Cas. Co., 8 Cir., 95 F. 2d 634.

Sulzbacher v. Travelers Insurance Co., 8 Cir. 137 F. 2d 386.

Rintoul v. Sun Life Assur. Co. of Canada, 7 Cir. 142 F. 2d 776. Cert. denied 65 S. Ct. 188, 323 U. S. 776, 89 L Ed. 620.

Binder v. General American Life Ins. Co., (S.D.) 282 N.W. 521.



Maryland Casualty Co. v. Boise Street Car Co.  
(Ida.) 11 P. 2d 1090.

## II.

An insurance policy must be read and construed as a whole.

New York Life Insurance Co. v. Hiatt, 9 Cir. 140  
F. 2d 752.

Travelers Insurance Co. v. Ship by Truck Co,  
8 Cir. 95 F. 2d 149.

Globe Indemnity Co. v. Wolcott and Lincoln, 8  
Cir. 152 F. 2d 545.

Sulzbacoher v. Travelers Ins. Co., 8 Cir., 137 F.  
2d 386.

Connellan v. Federal Life & Casualty Co., (Me.)  
182 A. 13.

## III.

While an insurance policy which is ambiguous in its terms will be construed most favorably to the insured, yet if there is no ambiguity the courts must enforce the contract in accordance with its terms and cannot make a new contract for the parties.

Davis v. Fidelity Mutual Life Insurance Co., 4 Cir.  
107 F. 2d 150.

Protective Life Insurance Co. v. Hale, (Ala.) 161  
S. 248.

Hewit Pharmacies Inc. v. Aetna Life Insurance Co.,  
266 N.Y.S. 290.

Kansas City Life Insurance Co. v. Freeman, 5 Cir.  
120 F. 2d 106.

Hagarty v. William Akers, Jr. Co., (Pa.) 20 A.  
2d 317.

Jorgensen v. Metropolitan Life Insurance Co.,  
(N.J.) 44 A. 2d 907. Affirmed 55 A 2d 2.

Pioneer Life Insurance Co. v. Alliance Life In-  
surance Co. (Ill.) 30 N.E. 2d 66.

Clark Motor Co. v. United Pac. Insurance Co.,  
(Ore.) 139 P. 2d 570.

#### IV.

An insurance contract should not be impaired by loose and ill-considered interpretation nor given unusual meanings from the language used or refined for the purpose of attempting to create an ambiguity.

29 Am. Jur., sec. 166, p. 185.

Terry v. New York Life Insurance Co., 104 F.  
2d 498, 504.

Commercial Standard Insurance Co. v. Bacon, 10  
Cor. 154 F. 2d 360, 364.

Williams v. Union Central Life Ins. Co. 291  
U.S. 170, 78 L. Ed. 711, 718.

Travelers Insurance Co. v. Springfield Fire &  
Marine Insurance Co., 8 Cir. 89 F. 2d 757.

In Re Podolsky, 3 Cir., 115 F. 2d 965.

Sulzbacher v. Travelers Insurance Co., 8 Cir. 137  
F. 2d 386.

Coons v. Home Life Insurance Co. of New York,  
(Ill.) 13 N.E. 2d 482.

Grimes v. Maryland Casualty Co., (Ill.) 20 N.E.  
2d 982.

Rein v. New York Life Insurance Co., (Minn.)  
299 N.W. 385.

## V.

The trial Court found no ambiguity in the policy and the provisions thereof must be enforced.

## VI.

The death certificate is prima facie evidence of the facts therein stated.

Sec. 39-207, Idaho Code.

Sec. 39-227, Idaho Code

Hillman v. Utah Power & Light Co., 56 Ida. 67,  
51 P. 2d 703.

## VII.

Without a cross-appeal an appellee may urge in support of the judgment any matter appearing in the record, even though the trial court concluded otherwise, when such argument is in further support of the judgment as entered.

U. S. v. American Railway Express Co., 265 U. S.  
425, 68 L. Ed. 1087, 1093.

Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 81 L. Ed. 593, 597.

### VIII.

While there is no liability in this case under the limitations of the policy neither is there liability under its general provisions because death was not by accident.

Wade v. Pacific Coast Elevator Co., 64 Ida. 176, 129 P. 2d 894.

Hutchison v. Aetna Life Ins. Co., (Ore.) 189 P. 2d 586.

Rodia v. Metropolitan Life Ins. Co., (Pa.) 47 Atl. 2d 152.

Howe v. National Life Ins. Co., (Mass.) 72 N. E. 2d 425.

Ryan v. Continental Casualty Co., 47 F. 2d 472.

Hodges et al. v. Mut. Benefit Health & Acci. Assn., (Wash.) 131 P. 2d 937.

Order of United Commercial Travelers v. Nicholson 9 F. 2d 7.

Kellner v. Travelers Insurance Co., (Cal.) 181 P. 61.

Russell v. Glens Falls Indemnity Co., (Neb.) 279 N. W. 287.

### IX.

A contract is deemed executed at the place where the last act was done, which in the case at bar was in Kansas City, Mis-

souri, and its construction should be governed by the laws of the State of Missouri.

11 Am Jur., Sec. 107, p 390 and p. 448.

Meiers & Frank Co. v. Bruce, 30 Ida. 732. 168 P. 5.

C. I. T. Corp v. Sanderson, 43 F. 2d 985.

W. H. Barber Co. v. Hughes (Ind.) 63 N. E. 2d 417.

Squire v. Eubanks (Mich.) 294 N. W. 166.

Prudential Insurance Co. of America v. Carlson., 10 Cir. 126 F. 2d 607.

## X.

Under no theory could the appellant recover under this policy as construed by the laws of Missouri.

Caldwell v. Travelers Insurance Co., (Mo.) 267 S. W. 907.

Pope v. Business Men's Assurance Co., (Mo.) 131 S. W. 2d 887.

## XI.

The Federal Courts will take judicial notice of the laws of another state.

Prudential Ins. Co. v. Carlson, 10 Cir. 126 F. 2d 607.

Zell v. American Seeting Co., 2 Cir. 138 F. 2d 641.

Judith Basin Land Co. v. Fergus County, 9 Cir. 50 F. 2d 792.



## ARGUMENT

## I.

**THE EVIDENCE FULLY SUPPORTS THE CONCLUSIONS AND  
JUDGMENT OF THE TRIAL COURT.**

As heretofore suggested this policy is an accident policy. Its language is clear and explicit and the coverage and exclusions are definitely and clearly recited. It insures against loss resulting directly and independently of all other causes from bodily injury effected solely through accidental means, subject to certain conditions and limitations contained in the policy. The policy definitely excludes and excepts bodily injury, fatal or otherwise, "caused wholly or partly, or the results of which are contributed to, by bodily or mental infirmity, hernia \* \* \* or by any disease, or medical or surgical treatment therefor, such hernia \* \* \* or medical or surgical treatment to be construed as sickness" (Defendant's Exhibit No. 11). The policy does not cover sickness. The trial court found that the deceased was operated on for hernia and that certain opiates and sedatives were administered as medical treatment, prior to death, following the operation for hernia. The exclusion provisions of the policy are then referred to in said findings, and the conclusion reached that because of such exclusions there could be no recovery (T. 17-19). Judgment was entered for the defendant (T.20-21). The evidence is overwhelmingly in favor of these conclusions. The operating physician, Dr. O. F. Call, following the death of Mr. Wilson, prepared and caused to be filed with the Department of Vital Statistics of the State of Idaho, the certificate of death (Defendant's Exhibit No. 10, T. 79-82).

This certificate was required to be filed by the attending physician pursuant to Sec. 39-207 Idaho Code, which section outlines the various questions to be asked and answered. Section 39-227, Idaho Code, provides that such certificate certified to be a true copy shall be prima facie evidence in all courts and places of the facts therein stated. In the case of *Hillman v. Utah Power & Light Co.*, 56 Ida. 67, 51 Pac. 2d 703, the two statutes above referred to are considered. On page 80 of the Idaho Report the Court says:

"A certified copy of the death certificate and a like copy of the physician's report of the accident were introduced in evidence with out objection, and it is now contended that under the foregoing statute they constituted prima facie evidence of each fact stated; and that it was the intention of the legislature in enacting the statute to modify the general rules of evidence to the extent that such certificates should constitute prima facie evidence of the facts therein stated. We are of the opinion that it was the intention of the legislature to so modify the rules of evidence as to render admissible such certificates to the extent and for the purposes enumerated in Sec. 38-222 (now 39-227) *supra*."

Subdivision 17 of Section 39-207, Idaho Code, provides that there be included in the certificate "cause of death, including the primary and contributory causes or complications, if any, and duration of each." In this certificate, defendant's Exhibit No. 10 (T. 82), questions and answers are follows:

Immediate Cause of Death: Pulmonary Embolism.  
Duration: Sudden.

Due to: Herniorrhaphy. Duration 24 hours.

Dr. Call, a witness called by the appellant, and a skilled surgeon, testified that the word "herniorrhaphy" means "repair of a hernia" (T. 78). It is true that the doctor attempted to qualify somewhat the statement in this certificate, yet, he never denied that the hernia and the surgical treatment therefor contributed to the death. Beginning at page 83 of the Transcript he testified as follows:

Q. At the time you made this certificate you felt that the herniorrhaphy or the hernia operation did have effect upon the embolism, that the embolism was caused from the operation?

A. As a contributing cause.

Q. You admit that the hernia operation was a contributing cause?

A. A contributing cause, yes, we will have to admit that.

The doctor then suggests a possibility that the embolism may have come from some other cause, yet he never departed from the fundamental fact that the hernia operation on April 7, 1947, was a contributing cause of the death of Mr. Wilson.

Beginning at page 85 of the Transcript, Dr. Call testified as follows:

Q. What was the herniorrhaphy due to?

A. Due to the operation at Mayo's.

Q. It all comes to this: If Harry H. Wilson had no hernia he would not have had an operation?

A. Sure.

Q. If he had no operation he would have had no herniorrhaphy?

A. That's right.

The doctor then states that he cannot be sure that the man would not have died had he had no operation, but on page 86 of the Transcript he testified as follows:

Q. It is probable that his death was due to the fact that he was operated on?

A. A contributing cause.

Q. You are sure of that?

A. Yes, sir.

Q. That it was a contributing cause?

A. That's right.

Q. No doubt about that?

A. No.

Q. You would not say that if there had been no operation that Harry H. Wilson would have died on the 8th of April at 5 o'clock in the morning?

A. That's right.

Q. So it was the operation that set in motion that which ended in his death?

A. Fundamentally, yes.

Q. And that was for the hernia?

A. Yes.

He then testified that if the breathing and snoring had anything to do with Mr. Wilson's death the operation was the inciting cause, that the patient had been operated on twice before, once for a bowel obstruction and the second time for a hernia (T. 86). On page 87 of the Transcript he testified:

Q. If there was any clot that resulted in the embolism, it was certainly due from some of those operations?

A. I think it was from some of those.

Q. Then it was a condition within his body at the time of the last operation?

A. Yes, sir.

Q. It was what we would term a bodily infirmity?

A. That's right.

Much more testimony was elicited from Dr. Call, which leaves no doubt but that the hernia was a contributing cause of the death.

The appellant called at the trial, Dr. W. W. Brothers. Dr. Brothers had nothing to do with the operation and his testimony was predicated upon the testimony of other doctors (T. 100). He gave it as his opinion that death was due to a pulmonary embolism excited by snoring and coughing (T. 102). He did not at any time deny that the hernia operation may have been a contributing cause. On the contrary a fair consideration of his testimony indicates that he felt such



was possible. On page 116 of the Transcript he testified as follows:

Q. So it is possible that this pulmonary embolism may have come from this operation?

A. Possible but not probable.

While he seemed to conclude that snoring and coughing was the cause of embolism which he said caused the death he did not disprove the theory that the snoring and coughing was due to a bodily infirmity. On the contrary, on cross-examination (T. 109) he was asked and answered the following question:

Q. I think you said that the condition of his bodily infirmity with reference to the snoring and coughing was the exciting cause of the embolism?

A. Yes, sir.

Furthermore, Dr. Brothers also testified that he thought that the embolism may have been due to the abdominal operation (T. 118). He admitted that it may have been due to a bodily infirmity (T. 117). It seems quite impossible for an intelligent man to argue that a clot of blood in the stream which causes death is not due to some bodily infirmity, particularly when there had preceded three major operations, any one of which could have been the basis of forming of blood clots. Upon the testimony therefore of the appellant's witnesses it would seem quite conclusive that recovery could not be had, particularly under the exceptions of the policy.

The appellee introduced testimony from five eminent surgeons, all of whom had had an unusual amount of experience in surgical work. Dr. Melvin M. Graves testified that a pulmonary embolism is not an unexpected event in surgery, and particularly when the operation is for hernia. At Transcript pages 150-151 he testified that over fifty percent of post operative deaths in hernia cases are due to embolism and that the expectancy is much greater in the older age group, to which Mr. Wilson belonged, than in the younger group (T. 151). He further testified that an embolism and the administering of opiates may have had an effect upon the patient, all of which, of course, was the result of the operation. Beginning at page 157 he testified:

Q. Following herniorrhaphy, in your opinion, would death following an embolism be the result of the herniorraphy?

A. Yes, I think it would.

Q. Explain why.

A. If a man has an inguinal hernia and on physical examination you find he is in reasonably good health; you admit him to the hospital, you admit him for operative treatment; you are going to repair it by surgery; that is the disease for which he is admitted to the hospital. If he dies from some secondary event the hernia for which he is admitted is the principal cause of death and the terminal event is a contributing cause of death.

Q. Would any effect that was dependent upon the venous system be incidental to that surgical procedure?

A. Yes.

Q. And co-existing with it?

A. Yes, Sir.

Q. Under those conditions would you say that the hernia was the contributing cause?

A. I would say it is the principal cause; no hernia, no death. If it had not been that he was admitted to the hospital for treatment for hernia he would not have died.

On page 159 of the Transcript he testified as follows:

Q. If he died from pulmonary embolism, would the operation for hernia twenty hours earlier be a contributing cause?

A. In my opinion it is the chief cause.

Q. If there had been no hernia there would have been no operation?

A. That is right.

Q. If there was no operation there would be no embolism?

A. That is right.

Q. If there had been no embolism there would have been no death?

A. That is right.

Q. So death was directly caused by the hernia?

A. That is my opinion.

Q. Hernia was a bodily infirmity?

A. That is right.

Dr. Joseph Beeman, a witness called for the appelle, testified on this point as follows:

Q. Doctor, in your opinion is a pulmonary embolism a probable result of a hernia operation?

A. Yes, sir, a pulmonary embolism may be anticipated and expected following a hernia operation or any other abdominal surgery (T. 164).

Dr. Beeman then explained why a pulmonary embolism was an expected and natural consequence of a hernia operation even though the same had been skillfully performed (T. 164 165), and that the same was reasonably foreseeable (T. 166), and the death following the same was not accidental (T. 167), using the following language: "In my opinion post-operative pulmonary embolism is not accidental for the reason that it arises from a diseased process of the venous system and is anticipated" (T.167).

Dr. O. F. Swindell testified that an embolism could be due to hernia, immobilization, and other contributing factors, and that any patient, particularly of the age of Mr. Wilson, who is operated on presents a potential case for pulmonary embolism (T. 170). At Transcript page 172 he testified that postoperative deaths following hernia operations are five times more frequent than in operations for appendicitis except

where the appendix is ruptured, and that such death was not accidental (T. 173).

Dr. F. A. Pittenger likewise testified that a pulmonary embolism following a hernia operation was something that might be reasonably anticipated. At Transcript 177 he testified as follows:

Q. Doctor, assuming that the patient, Harry H. Wilson, was operated on for hernia about 8 or 9 o'clock in the morning of April 7 and that he died of pulmonary embolism about 5 o'clock on the morning of the 8th. If he did die from such embolism would the operation for hernia be a contributing cause?

A. Yes, sir.

Q. Assume, Doctor, that Harry H. Wilson was suffering from hernia and that he was operated on for such a hernia and that his death followed within approximately twenty hours thereafter, either from pulmonary embolism or some other similar cause, would the fact that he was operated on for hernia be a contributing cause of his death?

A. Yes sir.

The doctor then testified that post operative deaths following a hernia operation are more prevalent than in other general operations and that the same is reasonably foreseeable in the sense that it is expected (T. 177, 178).

Dr. James L. Stewart testified that post-operative pulmonary embolism is something that is reasonably foreseeable and more prevalent in hernia and pelvic operations than in



other general operations and that there is effort made by surgeons to prevent such an embolism (T. 179-181). At Transcript 182 he testified as follows:

Q. Assume, Doctor, that Harry H. Wilson, was afflicted with a hernia and that he was operated on for this hernia at about 8 o'clock or 9 o'clock a. m. April 7, 1947, and that he died a little before 5:00 o'clock a.m. April 8, 1947, from pulmonary embolism or coronary embolism, would hernia and the treatment therefor be a contributing cause to his death?

A. Yes, sir.

Q. Would the operation for the hernia under such condition and the existence of the hernia be a contributing cause to his death if he had died from other causes?

A. Yes, sir, it would.

Q. State whether or not the fact that he had a hernia and was operated for the hernia and subsequently died be, in and of itself, a contributing cause to his death.

A. Yes, Sir.

Summarizing the foregoing testimony, it is to be noticed that seven doctors testified in this cause. Six of them very definitely stated that the death of Harry H. Wilson was either caused or contributed to by a bodily infirmity or a hernia and medical or surgical treatment thereof. The death certificate prepared and signed by the attending physician, and which under the Idaho statutes is *prima facie* evidence of the facts

therein stated, definitely recites that the embolism was due to a hernia operation. The seventh doctor, Dr. Brothers, did not deny the foregoing statement, but, as above recited, admitted that such may have been possible.

A plain, fair analysis of the testimony therefore can lead to no other conclusion than that the death of Mr. Wilson was caused wholly or partly, or the results of which were contributed to, by a hernia or medical or surgical treatment therefor. The parties agreed by the contract that such hernia or medical or surgical treatment must be construed as sickness and hence the resulting death was not within the terms of the policy.

The appellee is not to be understood by the foregoing argument that it admits that the death was an accident, but, even if such should be concluded, nevertheless, under the exception heretofore referred to, the trial court's judgment must be affirmed.

## II.

### **THE POLICY IS NOT AMBIGUOUS AND THE PROVISIONS, TAKEN AS A WHOLE, MUST BE ENFORCED AS THEREIN STATED.**

As we understand the appellant's brief there is no serious attack made upon the testimony of the doctors or the ultimate conclusion that must be drawn therefrom to the effect that the operation for hernia was a contributing cause of the death of the deceased. Much language is used in said brief, however, in an attempt to inject ambiguity into the wording of the policy presumably for the purpose of invoking the

general rule that where a policy of insurance is ambiguous it must be construed most strongly against the insurer. This argument has no place in this case because there is no ambiguity in the policy. Such a rule applies only when there is real ambiguity in the language of the policy. The intention of the parties is, after all, the rule that applies in insurance policies as well as in other contracts. Argumentative ambiguities should never be permitted. This rule is discussed in 29 American Jurisprudence, Section 166, and on page 185, it is said:

“Furthermore, the rule of strict construction applicable against the insurer where the intention of the parties cannot be otherwise ascertained, does not authorize the distortion or perversion of the language used in an insurance contract, nor does it furnish any warrant for creating an ambiguity where none otherwise exists; and the rule that the language of an insurance policy is to be construed most strongly against the insurer is no justification for giving one meaning to a term therein when defining it for the benefit of the insured and another when it is invoked by the insurer.”

There are numerous authorities cited in the text to support the foregoing statement. In this case the appellant argues, beginning on page 15 of Appellant's Brief, that the statement “such hernia \*\*\* medical or surgical treatment to be construed as sickness” is ambiguous, because it attempts to define something as sickness that is not, and was not, sickness from any standpoint. This is an attempt to read into the policy an ambiguity that does not exist. The policy does not say that such an ailment is sickness but shall be “construed” as sickness. Furthermore it is essential and necessary to con-

sider the entire policy to get the meaning of the various phrases. See:

New York Life Ins. Co. v. Hiatt, 9 Cir. 140 F. 2d 752.

Travelers Insurance Co. v. Ship By Truck Co., 8 Cir. 95 F. 2d 149.

Globe Indemnity Co. v. Wolcott and Lincoln, 8 Cir. 152 F. 2d 545.

This policy is purely an accident policy. It is not a policy insuring against death from sickness. It recites on the first page that the appellee "insures Harry H. Wilson against loss resulting directly and independently of all other causes from bodily injury sustained during any term of this policy and effected solely through accidental means, subject to the provisions, conditions, and limitations herein contained." It then recites the amount that will be paid for specific losses such as "feet," "hands," "eyes," etc. The insurance then covers loss of time and hospital confinement as the result of such bodily injuries. The loss of life is insured against when this loss is the result of an accident as defined in the policy, except for the limitations. These limitations, as the same pertain to the matter under consideration, are contained in paragraph numbered "1" of the General Provisions coverage of the policy, and among other things provide:

"The accident insurance under this policy covers all bodily injuries, fatal or otherwise, subject to the provisions, conditions and limitations specified in this policy, except: \* \* \* (5) those caused wholly

or partly, or the results of which are contributed to, by bodily or mental infirmity. hernia, ptomaines, bacterial infection (except pyrogenic infections which shall occur with and through a wound effected by accidental means) or any disease or medical or surgical treatment therefor, such hernia, ptomaines, bacterial infections, disease, or medical or surgical treatment to be construed as sickness."

Again we urge that death from sickness is not insured against. This was certainly known and understood by the assured. Obviously the small premium paid as compared with that which would have been paid if it were an ordinary life insurance policy would impress this fact upon the purchaser, as well as the language of the policy. The language used is perfectly clear, to the effect that the exceptions above mentioned are classified and grouped in a class of insurance not covered by an accident policy: namely, sickness. For the purposes of the policy these ailments are merely "*construed*" by the parties to the contract as sickness. This offered no ambiguity to the trial court. Quoting from the opinion:

"The second question is concerning the limitation clause in the policy. This is the limitation clause which excepts the defendant from liability, 'injuries, fatal or otherwise \*\*\* caused wholly or partly or the results of which are contributed to by \* \* \* hernia \* \* \* or medical \* \* \* treatment therefor.' This policy states plainly hernia or medical treatment therefor is to be construed as sickness" (T. 12, 13).

The Court could not do otherwise than to follow the wording of the policy and, under the evidence, deny recovery. The trial court followed the fundamental rule which is



clearly stated in the syllabus in *Davis v. Fidelity Mutual Life Insurance Co.*, 4th Cir., 107 F. (2) 150:

“An ambiguity in a life policy is to be construed most favorably to the insured, but courts cannot make a contract for the parties and can only enforce the contract which the parties themselves have made.”

Again we suggest that the argument of the appellant that the ambiguity, and therefore the exception, is not enforceable is without foundation in this case either in law or in fact. In *Terry v. New York Life Insurance Co.*, 104 F. (2) 498, on page 504, the Eighth Circuit Court of Appeals says:

“The rule that ambiguous clauses of an insurance policy are to be construed against the insurer can not be availed of to import into a contract a nonexistent ambiguity, to force unusual meanings from the language used, or to refine away terms expressed with sufficient clearness to convey the plain meaning of the parties. *Guarantee Company of North America v. Mechanics' Savings Bank & Trust Co.*, 183 U. S. 402, 419, 22 S. Ct. 124, 46 L. Ed. 253; *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 492, 52 S. Ct. 30, 76 L. Ed. 416; *Williams v. Union Central Life Ins. Co.*, 291 U. S. 170, 180, 54 S. Ct. 348, 78 L. Ed. 711, 92 A.L.R. 693; *McGlother v. Provident Mutl. Acc. Co.*, 8 Cir., 89 F. 685, 689; *Travelers Ins. Co. v. Spring-Field Fire & Marine Ins. Co.*, 8 Cir. 89 F. 2d 757. Even though we might think that the meaning of the challenged words used by the insurer could have been better or more accurately expressed, that would constitute no justification for disregarding the plain import of appropriate language. *Williams v. Union Central Life Ins. Co.*, *supra*.

291 U. S. page 180, 54 S. Ct. 348, 78, L. Ed. 711, 92 A.L.R. 693."

Counsel for the appellant in his brief urges that the case of *Jensma v. Sun Life Insurance Company*, 64 F. 2d 457, decided by this Honorable Court, supports the request for a reversal of the trial court on this point. We suggest that the case is not contrary to the position urged by the appellee and neither is this case contrary to the rule for which we are contending, that one may not read into an insurance policy matters not contained therein nor create an ambiguity when none in reality exists.

Much reliance is given by the appellant on the case of *Browning v. Equitable Life Assurance Society*, (Ut.) 72 P. 2d 1060. This case likewise does not militate against the position of the appellee. There appear to be no limitations in the policy considered in the *Browning* case containing language of the type and character of that used in the policy under consideration. In this case the Utah court recognizes the rule for which we contend and on page 1066 the Utah court quoting from *Cato v. Aetna Life Insurance Co.*, (Ga.) 138 S.E. 787, says:

"The rights of parties are to be determined by the terms of the policy so far as they are lawful. The language of the contract should be construed as a whole and should receive a reasonable construction, and not be extended beyond what is fairly within the terms of the policy. Where the language is unambiguous and but one reasonable construction of the policy is possible, the court must expound it as made."

Other cases cited by the appellant are predicated upon language which is ambiguous — not where one party attempts to read something into a contract or give it a meaning which clearly does not exist.

Again we suggest that the learned trial court saw no ambiguity in this policy. If he could have seen any, as appears from the opinion written and the decision in the New York Life case, he may have held against the appellee. The very fact that he entered the judgment appealed from is a compelling argument against the present contention of the appellant.

There are a great many cases supporting the position of the appellee to the effect that ambiguity should not be read into a contract nor the language twisted and warped in order to create ambiguity and the contract must be considered as a whole, and that the contract in ordinary and plain language should be enforced in accordance with its terms. A number of these cases are cited in this brief under "Points and Authorities."

In *Williams v. Union Central Life Insurance Co.*, 291 U. S. 170, 78 L. Ed. 711, on page 718 Chief Justice Hughes says:

"While it is highly important that ambiguous clauses should not be permitted to serve as traps for policy holders, it is equally important to the insured, as well as to the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations."

As heretofore suggested this policy was for a premium much less than a life insurance policy. As stated by the doctors who testified, a pulmonary embolism causing death is much more likely to occur as the result of a hernia operation than other types of operations, and obviously such known fact had its bearing upon the wording of this policy and the premium charged therefor.

### III.

**WITHOUT A CROSS-APPEAL AN APPELLEE MAY URGE IN SUPPORT OF A JUDGMENT ANY MATTER IN THE RECORD, EVEN THOUGH THE TRIAL COURT OVERLOOKED THE POINT OR CONSIDERED IT ADVERSELY TO APPELLEE.**

The trial court could have properly and justly held that the death of the deceased was contributed to by a hernia, and this alone would of necessity, under the wording of the policy, have required a decision in favor of the appellee. In the Appellant's Brief it is said on page 8, "the appellee has not filed any cross-appeal" or called for other parts of the record to be printed. The appellee has the right to assume, of course, that all of the record would be printed that has anything to do with any of the testimony in this case, and all exhibits will be before the court. This is clear from the designations of the record made by the appellant. We presume, however, that the foregoing suggestion touching a cross-appeal is made with the idea of limiting the appellate court to a consideration of the precise holding of the trial court without the ability to consider other matters which would support the judgment. While, of course, an appellee without a cross-appeal cannot



attack the judgment appealed from, nevertheless it can urge anything in the record which would support that judgment. In the case of *United States v. American Railway Express Co.*, 265 U. S. 425, 68 L. Ed. 1087, this matter is discussed by Justice Brandeis, and the conclusion of the Court is expressed in the syllabus as follows:

“An appellee may without taking a cross-appeal urge in support of a decree any matter appearing on the record, although the argument may involve an attack on the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.”

The foregoing statement is supported by a number of decisions cited in the opinion. In the case of *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, the Supreme Court again follows this rule and cites the above entitled case, and on page 597 says:

“Without a cross-appeal an appellee may ‘urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.’”

Clearly therefore the appellee can and does hereby urge, a consideration of other parts of the policy and the policy as a whole in support of the final judgment.



## IV.

**THE TRIAL COURT MAY WELL HAVE DECIDED THIS CASE UNDER THE PRIMARY PROVISIONS OF THE POLICY PROVIDING THAT IT COVERED LOSS RESULTING DIRECTLY AND INDEPENDENTLY OF ALL OTHER CAUSES EFFECTED SOLELY THROUGH ACCIDENTAL MEANS.**

The judgment of the trial court in this case is seemingly predicated upon the limitations expressed in the policy rather than upon the general provisions. While it is sufficient for the other purposes of this action to have said judgment based upon the limitations prescribed, yet it may well be argued that liability should also be denied upon the basis that the death through embolism following a hernia operation was not an accident. This point is now before this Honorable Court in the case of New York Life Insurance Company v. Wilson, wherein the same testimony in so far as the general provisions of the policy are concerned was introduced and considered, as appears in the record in this case, and if this court should reverse the trial court in the New York Life case, most certainly it would also of necessity result in an affirmance of this case. We do not mean by this statement that the present case is necessarily controlled by the New York Life case, because the policy, particularly with reference to limitations, is entirely different, and it is contended the trial court should be affirmed in the present case irrespective of the result of the other case. Nevertheless, by reason of the decisions in the Williams and Morley cases, it is thought perfectly proper to urge as an additional ground for the affirmance of this case the fact that the death was not within the general coverage

of the policy. By reason of the fact that the other case is now before the court upon the same testimony so far as this point is concerned as is involved in this case, and has been briefed by counsel it is thought unnecessary to further extend this brief in the argument of such point, although some authorities in support thereof are cited herein, and this argument is therefore asserted in the event that the New York Life case should be reversed as additional reason for the affirmance of the trial court's opinion in this case.

## V.

### **THIS CASE SHOULD BE DECIDED UNDER THE LAW OF MISSOURI**

The appellee pleaded as a defense that the insurance policy was written and signed in Kansas City, Missouri, and became a Missouri contract and must be construed under the laws of that State (T. 9). At the trial evidence was introduced in support of this theory, to which evidence, we urge, there was no contradiction. The trial court found that the insured made application for said insurance policy in the State of Idaho, was examined by an Idaho physician, and that said policy was delivered to him in said State. The Court therefore concluded that it was interpreted in accordance with the law of Idaho. This, we contend, was an erroneous construction of the evidence and the law pertaining thereto. The only evidence touching any of the matters contained in Paragraph XV of the Court's Findings (T. 18) is contained in the policy itself. This policy recites that it was signed at the "Home Office" of the Company in Kansas City and that it

became effective at 12:00 o'clock noon at the residence of the insured on the day it was signed. The Court would probably take judicial notice of the time element and that this obviously means that it became effective in Kansas City at 2:00 o'clock p.m. on the day the signature of the Company's official was placed on the policy. The policy further provides that the application shall form a part thereof, and from the application attached to the policy it is to be observed that the premium was transmitted to the Home Office with the application. Hence, at the time the policy was signed the premium had been paid at Kansas City and the policy thereupon at the hour stated became effective. The last act to make the policy effective was the acceptance by the insurance company of Mr. Wilson's application and the premium and the signing of the policy. This was done in Kansas City. The policy was probably mailed from the Home Office in Kansas City, but it was effective nevertheless even before it was mailed. In Restatement of Conflicts of Law of the A.L.I., it is said, sec. 314:

"When a document embodying a formal contract is to be delivered by mail the place of contracting is where the document is posted."

In 11 American Jurisprudence 390, under the topic "Conflict of Laws," sec. 107, it is said:

"In accordance with general principles relating to contracts where the parties are in different jurisdictions a contract of insurance is deemed to be executed at the place where the last act is done which is necessary to complete the transaction and bind the

parties (citing authorities). \*\*\* Generally the contract will be deemed to have been made at the Home Office of the insurer if the first premium accompanies the applicaton."

Again, in 11 Am. Jur. p. 448, under "Conflict of Laws," it is said:

"When the question of the place where a contract of insurance is made is solved the determination of the question as to the construction to be placed upon the terms of the contract and as to the validity thereof and of the laws which are to govern such construction and validity is comparatively easy because it is the almost universal rule that the contract of insurance must be governed by the laws of the state where such contract is finally consummated."

While the Idaho Supreme Court has not had before it the specific question so far as the same affects a contract of insurance, yet the general principle of law above stated has certainly been followed in other cases. In the case of *Meier & Frank Co. v. Bruce*, 30 Ida, 732, 168 P. 5, the Court had before it a contract executed by a wife in the State of Oregon. It would have been invalid in Idaho because of the manner of its form and execution. The Court, however, applied the last act doctrine and upheld the contract by reason of the laws of Oregon. The Court holds:

"A contract entered into by a married woman in the State of Oregon while there domiciled and to be performed therein is a valid contract and must be enforced by the courts of this state."



In the case of *C. I. T. Corporation v. Sanderson*, 43 F. 2d 985, the Court had for consideration a contract which was entered into in California and which was valid under the California law but not valid under the Idaho law, because in Idaho a woman could not bind herself under such a contract, but in California she could. The Court holds:

“Contract is considered as entered into at the place where the offer is accepted and delivery made or where the last act necessary to complete performance is made.”

The Court also holds:

“Contract of guarantee required to be forwarded to California for acceptance by creditor in advancing funds thereon held made in California.”

This same matter was again before the Court in the same case reported in 49 F. 2d 937, wherein again the Court held:

“Guarantee required to be forwarded to California for acceptance by creditor advancing funds held made in California and governed by the laws thereof.”

Other cases supporting this same rule have heretofore been cited in this brief under Points and Authorities.

Here the last act done under this policy was in Missouri. The application was probably forwarded to Missouri together with the premium, but there was no contract until such was accepted and the policy signed. Under the universal law the construction of this contract must necessarily be under



the Missouri law. There are some Idaho cases where it has been held that in insurance contracts the Idaho law applied, but this particular point has not been raised in such cases, and undoubtedly the facts as they exist in this case were not presented in these other cases. It is therefore apparent that the law of Idaho is not contrary to the general rule hereinbefore expressed. Some question might arise as to whether or not a Federal Court will take judicial notice of the laws of other states of the Union. In *Prudential Insurance Company of America v. Carlson*, 126 F. 2d 607, it is held:

“Where accident policy provided that it was not to take effect until approved by insurer at its home office in New Jersey, policy was a New Jersey contract and was governed by the laws of New Jersey.”

Also:

“A Federal court takes judicial notice of the laws not only of the forum but also those of other states, but such rule means no more than that one relying upon a statute of a foreign state need not plead it.”

In *Zell v. American Seeting Co.*, 138 F. 2d 641, it is held:

“Federal Courts take judicial notice of the decisions of courts of the several states.”

This same doctrine has been followed by this Court in *Judith Basin Land Co. v. Fergus County*, (Mont.) 9th Cir., 50 F. 2d 792, wherein it is said:

“Courts of the United States take judicial notice of

the laws of any state whether depending upon state statute or judicial decision."

Lamar v. Micou. 114 U. S. 218, 5 S. Ct. 857, 29 L. E. 94.

Fearing some contention might arise as to whether or not it was necessary to plead and prove the law of another jurisdiction, the appellee pleaded the law of Missouri, and also introduced in evidence the reported cases of *Caldwell v. Travelers Insurance Co.*, (Mo.) 267 S. W. 907, and *Pope v. Business Men's Assurance Co.*, (Mo.) 131 S. W. 2d 887 (T. 183). The proof of these cases in this manner is justified under Rule 43 of the Rules of Federal Procedure and Section 9-308 Idaho Code.

The law of Missouri in the construction of insurance policies of the character under consideration and, as a matter of fact, of this particular policy, definitely precludes recovery by the appellant upon any theory, under the facts in this case, and even without the consideration of hernia and bodily infirmity contributing to the death as hereinbefore argued. In the case of *Caldwell v. Travelers Insurance Co.*, (Mo.), 267 S. W. 907, 39 A. L. R. 56, as appears from the syllabi in the A. L. R. report, it is held:

"Unusual and unexpected obstruction of patient's bowels by a skillful operation performed on him for hernia, causing death, is not within a policy insuring against death from bodily injuries effected directly and independently of all other means through external, violent and accidental means."

This case also holds:

"One attempting to recover on a policy insuring against death by accidental means has the burden of showing an accidental cause of insured's death."

Also:

"To recover under a policy insuring against death by accidental means, for death following a surgical operation performed in a skillful manner, plaintiff must show that something unforeseen, unusual, or unexpected and unintended occurred during the progress of the operation and that this caused the death."

The Caldwell case overruled some other cases heretofore decided by the Missouri Court. In the opinion the Court says:

"The evidence offered by plaintiff tended to show that on November 6, 1920, the insured was operated upon for two hernias. Not only does the evidence show, but the petition alleges, that the operation was skillfully performed. There is no evidence of any mischance, slip, or mishap, nor of any unexpected, unusual or unforeseen occurrence during the performance of said operation. The operating surgeon testified that he could not do it any better if he had to do it over, and that he did not think anyone else could do it any better. No more injury by way of cutting or laceration was caused than was actually necessary in the performance of the operation. The operation was performed at the request of the insured."

The Court then says that notwithstanding the highest skill was used, an obstruction occurred in the bowel which caused the insured's death. A large number of cases on this point were considered and the court concludes that such death was not caused by accidental means.

In the case of *Pope v. Business Mens' Assurance Company*, 131 S.W. 2d 887, the Missouri Court had under consideration the precise form of policy now before this Court. The Court held that there was no liability under the policy. It is held:

“Under policy payable on death of policyholder, through accidental means, where an unusual or unexpected result occurs by reason of the doing by the insured of an intentional act, and no mischance, slip or mishap occurs in the doing of the act itself, the ensuing injury or death is not caused through accidental means.”

Also, this case holds:

“Under policy insuring against death through accidental means, it must appear that the means used were accidental, and it is not sufficient to warrant recovery that the result may be unusual, unexpected, or unforeseen.

It will be observed from a consideration of these cases that it would be impossible for the appellant to recover on this policy under the laws of Missouri under any theory. A consideration of the foregoing principle and cases is urged in support of the judgment if the Court should conclude that the trial court erred in the theory adopted in the case at bar or if there should be an affirmance of the *New York Life* case.

### CONCLUSION

In conclusion therefore it is most respectfully submitted

that the judgment of the trial court in this case must be affirmed.

Respectfully Submitted,

A. L. MERRILL

R. D. MERRILL

W. F. MERRILL

*Attorneys for Appellee.*

Residence: Pocatello, Idaho



## APPENDIX "A"

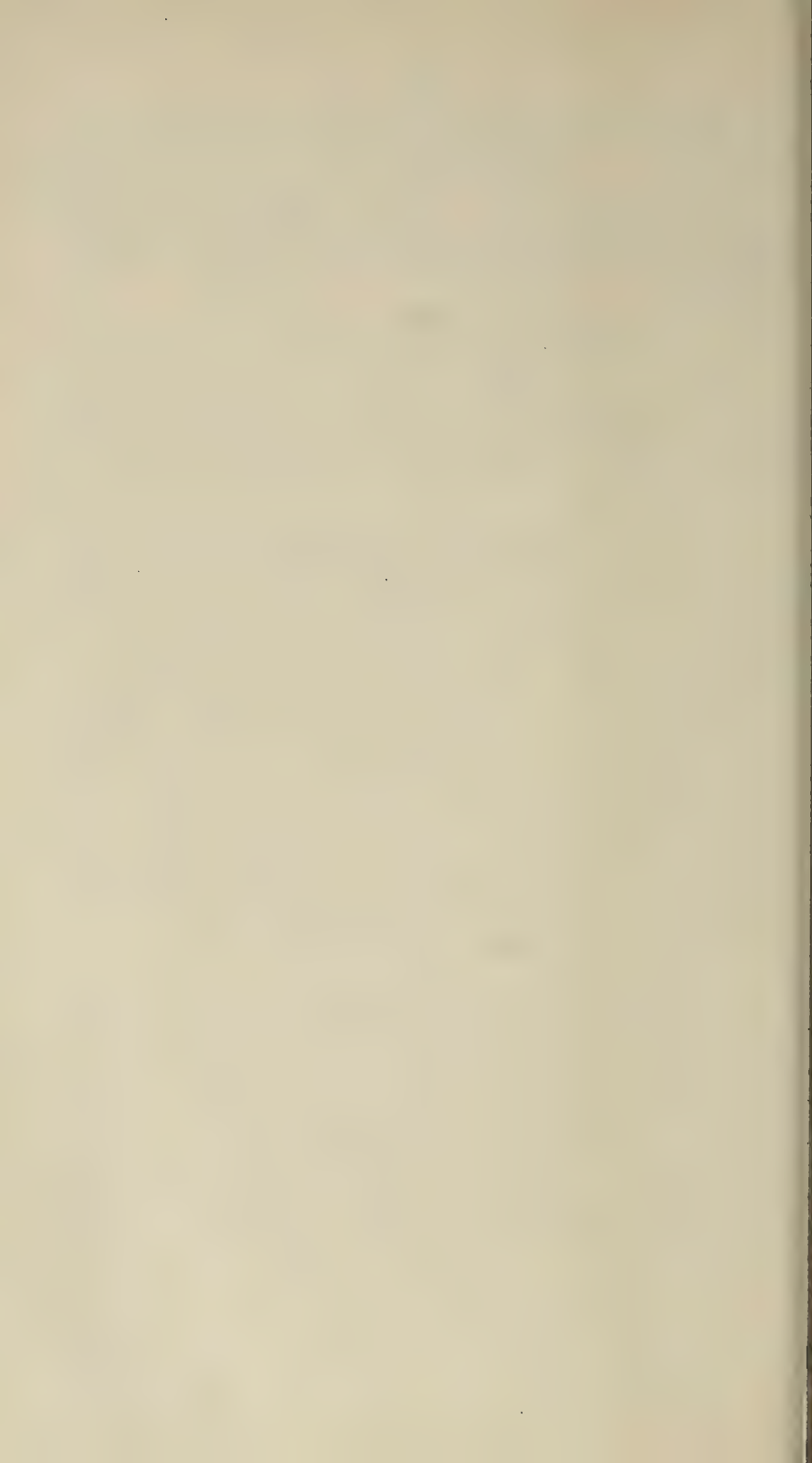
Sec. 39-207, Idaho Code. CERTIFICATES OF DEATH.—The certificate of death shall contain the following items:

\* \* \* \* \*

17. Cause of death, including the primary and contributory causes or complications, if any, and duration of each. \* \*

Sec. 39-227, Idaho Code. CERTIFIED COPIES AND SEARCHES FOR BIRTH AND DEATH CERTIFICATES—USE AS EVIDENCE—FEES.—The department of public health shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under the provisions of this chapter, for the making and certification of which it shall be entitled to a fee of fifty cents, to be paid by the applicant; and any such copy of the record of birth or death, when properly certified by the department to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. \* \* \*

Sec. 9-308, Idaho Code. ORAL EVIDENCE OF COMMON LAW—REPORTS OF DECISIONS.—The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of another state, territory or foreign country, as are also printed and published books of reports of decisions of the courts of such state, territory or country, commonly admitted in such courts.



IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

CECELIA J. WILSON,

*Appellant,*

vs.

BUSINESS MEN'S ASSURANCE COMPANY OF  
AMERICA, a corporation,

*Appellee.*

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## Reply Brief of Appellant

---

On appeal from the United States District Court for the  
District of Idaho, Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

B. W. DAVIS,  
Pocatello, Idaho  
*Attorney for Appellant.*

FILED

DEC 30 1949

PAUL P. O'BRIEN

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No. 12,284

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FOR THE NINTH CIRCUIT

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---

## Reply Brief of Appellant

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### SUMMARY

The instant case, if it presents any question for **deter-**mination, presents only the question of whether or not the language found under the heading of General Provisions in the first paragraph thereof on the last page of the policy in question, to the effect that certain things are to be construed as sickness, precludes appellant from recovery by reason of such language. This statement can now be safely made by reason of this court's decision in *New York Life Insurance Co. v. Wilson* No. 12227, heretofore decided by this court on November 21, 1949. In that case the appellate court has held that the beneficiary established death by accident within

the general insuring clause of the policy and that the death did not result directly or indirectly from *infirmity of mind or body, illness or disease*, or from any bacterial infection.

And it is appellant's contention that sickness and disease, being synonymous, that the case decided is conclusive.

The present policy, that is the policy of Business Men's Assurance Co. is an accident policy insuring against death, accident, covering loss of limbs, sight and time and is less restrictive in the general insurance clause than the policy of the New York Life Insurance Company. The general insurance clause found on page one of the present policy is as follows:

"Hereby insures Harry H. Wilson against loss resulting directly and independently of all other causes from bodily injuries sustained during any term of this policy and affected solely through accidental means." \* \* \*

Article One under the heading INDEMNITY FOR SPECIFIC LOSSES provides:

"Article 1. If such injuries independently of all other causes result within ninety days from date of accident in any one of the losses enumerated in this Article, the Company will pay in lieu of all other indemnities provided herein indemnity set opposite such loss and in addition thereto monthly indemnity as provided in Article 11 to the date of such loss.

FOR LOSS OF

LIFE THE SINGLE DEATH INDEMNITY

There then follows in the policy Articles 2 to 10, providing for the different indemnities for surgical benefits, optional cash payments etc. Then follows: STANDARD

PROVISIONS — There are 17 Provisions in number Among the Standard Provisions is No. 8 which provides:

“\* \* \* and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.”

Then follow the *General Provisions* of the Policy, there being five in number.

It will be observed that the General Provisions found on the last page of the policy are not under any heading of limitations or conditions and that the limitations and conditions are found generally under the Standard Provisions of the Policy.

The beneficiary has clearly established her case and the right to recover under the insuring clause found on the first page of the policy, which is an accident policy providing for payment not only in case of death, but providing for payment for medical treatment and for loss of time in case of accident. And in the General Provisions of the Policy as quoted herein, it is attempted to define medical or surgical treatment as sickness, and this is directly contrary and in conflict with the general insuring clause and places the burden upon the defendant of proving death by sickness or disease, which are synonymous, and immediately creates in the policy an ambiguity, which must, under the Idaho law, be construed favorably to the beneficiary.

We make this statement unqualifiedly by reason of both the fact and the law, that if an insured, by accidental means, receives an injury that causes a hernia and resulting death, that

the insuring clause would clearly, under the authorities we cite, entitle the beneficiary to recover and that the conditions or limitations under the General Provisions that provide that hernia is sickness, creates an ambiguity and that the courts will not so construe the same as sickness if the proximate cause of the death was an accident within the meaning of the policy.

The question before the court is still the same, namely, Was the death of the deceased caused:

“Wholly or partly or the result of which are contributed to, by bodily or mental infirmity, hernia, ptomaines, bacterial infections, or by any disease.”

Both the trial court and the appellate court have held that hernia was not the cause of the death and both courts have held that death was not caused directly or indirectly from bodily or mental infirmity or disease.

In fact, it was never seriously contended at the trial of the cause, that death was the result of sickness or disease and evidence was not introduced upon that theory by appellee and the case of *Rauert v. Loyal Protective Insurance Co. (Ida.)* 106 Pac. 2d. 1015 is squarely in point on this phase of the case. The only testimony on this phase of the matter is that of Dr. Brothers who testified:

“Q. And everyone of those go back to a bodily infirmity?

A. Injuries and prior operations you would not call them diseases.”

It is clear then, by reason of the recent decision referred to and by reason of the holding of the trial court, that Harry H. Wilson did not meet his death by reason of,

“or by any disease or medical or surgical treatment therefor,” so the medical or surgical treatment not having been

given for a disease, as clearly there is no contention that hernia is a disease, this exclusion does not in any way affect appellant's rights and the final wording:

"such hernia \* \* \*, disease or medical, or surgical treatment to be construed as sickness"

is not an exclusion or a limitation at all, but is merely explanatory, and surgical or medical treatment, not having been given for disease, the statement by the company that disease is to be construed as sickness or that medical or surgical treatment therefor is to be construed as sickness, adds nothing whatever to the policy because as stated, sickness and disease are synonymous and because the policy of the New York Life Insurance Company in New York Life Insurance Company v. Wilson, also provided that there could be no recovery if death resulted

"\* \* directly or indirectly from infirmity of mind or body, from illness or *disease*."

## POINTS AND AUTHORITIES

### I.

Where accident policy insured against loss of life, limb, sight or time resulting directly from accidental means, subsequent provisions of the policy under what are deemed General Provisions attempting to limit the general insuring clause and providing that hernia shall be construed as sickness, creates an ambiguity in the policy which must be construed in favor of the insured. (Policies with apparent identical language have been so construed)

Shain v. Mutual Benefit Health & Accident Assurance Co. (Ia.) 7 N.W. 2d 806;

Provident Life & Accident Insurance Co. v. Simms, (Tex.) 149 S.W. 2d, 281;



- National Accident and Health Insurance Co. v. Childs (Ga.) 9 S.E. 2d, 108;  
 Browning v. Equitable Life Assurance Society (Utah) 80 Pac. 2d. 348;  
 Railway Mail Association v. Babbitt, 160 Fed. 2d. 314;  
 Order of Railway Conductors of America v. Gregory, 91 S.W. 2d. 1139;  
 Travelers Ins. Co. of Hartford v. Murray, 16 Colo. 296, 26, Pac. 774;  
 Kentucky Life & Accident Ins. Co. v. Harper, 19 S.W. 2d. 973.

## II.

The appellate court having held in *New York Life Insurance Co. v. Wilson*, Case No. 12227, that the beneficiary, under identical medical testimony, has brought herself within the liability under the insurance clause, she is entitled to recover, the defendant not having established that death was due to sickness.

- Rauert v. Loyal Protective Insurance Co. (Ida.) 106 Pac. 2d. 1015;  
 Clayton v. Metropolitan Life Insurance Co. (Utah) 85 Pac. 2d. 820;  
 Ballam v. Metropolitan Life Ins. Co. 3 N.E. 2d. 1012 (Mass.) 108 A.L.R. 1 (See note on Page 31);  
 Browning v. Equitable Life Assurance Society, *supra*;  
 Griffin v. Prudential Insurance Co. of America, (Utah) 133 Pac. 2d. 333;  
 Lee v. New York Life Insurance Co. (Utah) 82 Pac. 2d. 178;  
 Hassing v. Mutual Life Insurance Co. of New York (Utah) 159, Pac. 2d. 117;  
 Young v. New York Life Insurance Co. (Mo.) 221 S.W. 2d. 843;

- Metropolitan Casualty Ins. Co. of N. Y. v. Fairchild, 220 S.W. 2d. 803;  
 Mason v. Life & Casualty Ins. Co. v. Tennessee, 41 So. 2d. 153;  
 Preston v. Aetna Life Ins. Co. 174 Fed. 2d. 10;  
 Happoldt v. Guardian Life Ins. Co. of Am. (Calif.) 203 Pac. 2d. 55.

### III.

The terms "sickness and disease" are synonymous and imply a substantial illness or malady which has a general bearing on the health of the insured.

- Conn. Mutual Life Insurance v. Union Trust Co. 112 U.S. 250-251, 5 Sp. Ct. 119, 28 L. Ed. 708;  
 Sheinman & Sons Inc. v. Scranton Life Insurance Co. (Pa.) 39 Fed. Supp. 398;  
 U. S. Fidelity & Guaranty Co. v. Blum (9th Cir.) 270 Fed. 946;  
 McAllister v. State of Alabama, 181 So. 511;  
 Poole v. Imperial Mutual Life & Health Insurance Co. (N.C.) 125 S.E. 8;  
 Browning v. Equitable Life Assurance Society, *supra*.

### IV.

The law of the State where the contract is to be enforced governs.

- Pritchard Ex. v. Norton, 106 U.S. 124-141, 27 L. Ed. 104;  
 Equitable Life Assurance Society of the U. S. v. Benjamin F. Peltus, 40 U.S. 227-234, Sp. Ct. Reporter, 226-234, 35 L. Ed. 140;  
 Catherine Ware Nielsen v. General American Life Insurance Co. 89 Fed. 2d. 90;  
 Compania Atlantica Centro-American S.A. v. Alliance Assurance Co. Ltd. et al. 50 Fed. Supp. 986.

## ARGUMENT

We will first discuss the only provisions of the death and accident policy before the court that as we understand it, could possibly now affect the decision in this case and that were set out and construed by the learned trial Judge as precluding recovery by the plaintiff.

We believe it is certainly fair and reasonable to state and assume that had the decisions that are herein called to this court's attention, been called to the attention of the trial court, that his decision would have been otherwise in this particular case.

However, it must be readily apparent to this court from the transcript and from the medical testimony that the instant case was presented to the trial court by counsel on both sides upon the same identical theory that it was presented to this court in the case of *New York Life Insurance Co. v. Wilson*, *supra*.

There is called to the court's attention, authorities clearly indicating that the language in the exclusion provisions of the policy with reference to medical or surgical treatment or sickness or disease is not controlling in a case of this kind at all, and that they either refer to the medical or surgical treatment for sickness or disease that is not caused by accident or that if they do not so refer, that the policy is ambiguous and not in conformity with the general insuring clause and that the ambiguity, must, of course, be construed favorably to the insured.

The case of *Handley v. Mutual Life Insurance Co. of New York* (Utah) 147 Pac. 2d. 319, not only re-affirms *Browning vs. Equitable Life Assurance Society*, 72 Pac. 2d.

1060 and 80 Pac. 2d. 348, but is so nearly on all fours with the present case insofar as the facts are concerned, as to be very unusual in that respect. This is a hernia case where the insured died, either from pulmonary thrombus or pulmonary embolism and the policy contained among other things, a provision that there must be due proof

“that the insured died as a direct result of bodily injury, affected solely through external, violent, and accidental means, independently and exclusively of all other causes, and of which \* \* \* there is evidence by a visible contusion or wound on the exterior of the body, and that such death occurred (a) within ninety days after the date of such injury. \* \* \*

The provisions of the policy providing that the death must have been by accidental means independently and exclusively of all other causes would exclude sickness, disease, bodily infirmity or any other independent cause. We call attention to the fact that there was an autopsy in this particular case and as heretofore suggested, the facts are more nearly identical than is usually found to be the case in briefing a matter of this kind.

The following cases seem to contain the identical language of the instant policy insofar as the question before the court is concerned, but regardless of whether they are identical the principle of law is exactly the same and it will be observed that they are in point on the construction of the terms of the policy.

In *Shain vs. Mutual Benefit Health and Accident Assurance Co.* (Ia.) 7 N.W. 2d. 806, the court held that a policy referring to sickness was ambiguous and in its opinion said:

“It is our opinion that on account of the statements made in the insuring clause, the provisions as

to specific losses in Part "A," and the restrictive clauses in Part "K" that there is an ambiguity in the contract now before us and that, in the interpretation, it should be construed most favorably to the insured. The statement made by Justice Oliver in *New York Life Ins. Co. v. Rotman*, supra, is quite applicable in this case. It was there stated at Page 604 of 3 N.W. 2d. as follows:

' \* \* \* The test to be applied by the court in determining this issue is not what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance of this type would have understood them to mean.' "

To show that the terms of the policy being considered by the court in this case are similar, we quote further from the opinion as follows: See Appendix "A"

In *Provident Life & Accident Insurance Co. v. Simms*, (Tex.) 149 S.W. 2d. 281, the court had before it an accident policy and the question was on the construction of the policy where a hernia was involved.

The question was over the construction of the insurance clause, part one, part three and part fifteen. The same are quoted: See Appendix "B"

In the case of *National Accident & Health Insurance Co. v. Childs* (Ga.) 9 S.E. 2d. 108, the court had before it, the construction of a policy where there was a provision that certain things should be considered arising out of sickness and disease and that they were covered only under and subject to the illness provisions of the policy. The provisions in that part of the policy attempting to exclude certain injuries or illness were in the disjunctive, using the word or the same as the exclusions in the instant policy. The court in determining that matter said: See Appendix "C."



It does not require further citations to show the liberal rule of construction in favor of the insured adopted by the Idaho Supreme Court or the fact that Idaho has definitely placed itself on record with those courts allowing recoveries in cases of this kind.

The case of *Browning vs. Equitable Life Assurance Society* (Utah) 80 Pac. 2d. 348 which has been cited and quoted from in appellant's original brief, holds without question that in a policy, the terms identical to those here, that sickness or disease mean a sickness or disease of such a character that would result in death independently of the accident.

A perusal of the Utah cases cited in this Reply Brief show the continual re-affirmance of the *Browning* case and in addition the continued citation of that case by the Idaho Supreme Court makes the *Browning* case and the other Utah cases just as much the law of the State of Idaho as the *O'Neill* case or any other Idaho case cited.

In *Clayton v. Metropolitan Life Insurance Co.* (Utah), 85 Pac. 2d. 821, the court had before it a policy which excluded death caused wholly or partly, directly or indirectly by disease or medical or surgical treatment therefor. The insuring clause in that policy is the same as the insuring clause here and the holding is directly in favor of the plaintiff.

The exclusions relied on by appellee as defeating recovery refer to

"All bodily injuries, fatal or otherwise."

These exclusions are not referring merely to death and it is clear that the reference to medical or surgical treatment as "sickness" is also for the purpose of relieving the company of

being obliged to pay for an operation for hernia or any disease or sickness not caused by accident.

If one paraphrases the language of the court in *Travelers Insurance Co. of Hartford v. Murray*, 16 Colo. 296, 26 Pac. 774, the decision is immediately found applicable here. This language is in the second column on Page 776 of the Pacific Reporter. The policy there <sup>CONTAINED</sup> ~~contained~~ a provision with reference to medical and surgical treatment and we paraphrase the language from the opinion:

"We cannot adopt the construction of the exception in the contract of insurance so ably urged. The hernia *embolism* must be regarded as the result of the accident that caused the death; the cause of the death; the force of the blow received *violent choking and coughing*; the consequent injury arising from the concussion *choking and coughing* and the hernia *embolism* resulting. Deceased was insured against the accident by the terms of the body of the policy."

It can well be argued as the law that the exclusion relied upon in the policy applies only to non-fatal accidents.

Kentucky Life & Accident Insce. Co. v. Harper,  
19 S.W. 2d. 973

But the rule of law laid down in this case is conclusive that appellant's analysis of the policy is correct and that at least the exclusion clause would be ambiguous when construed in connection with the insuring clause.

As pointed out, this policy covered and provided for payments for exceptions that did not result in death. As showing the ambiguity in this policy and the inconsistencies between the general insuring clause and the general provisions under which we find the exclusions, attention is called to Article X under the schedule of operations on the opposite side of the

sheet containing the Standard Provisions. Under this article is given a schedule of Operations and the amount that will be allowed and the very first provision is:

“Abdomen—cutting into Abdominal Cavity for diagnosis or treatment of organs therein, \$200.00”  
 Certainly this is medical or surgical treatment and if the appellee’s construction of this policy is correct, then one who receives a blow by accident that results in a hernia and is given a surgical or medical treatment for that hernia and who dies, cannot under any circumstances recover, through his beneficiary, by reason of the fact that the surgical and medical treatment are sickness and that this is not a sickness policy, and there could not even be a recovery of the \$200.00

How can it be contended that the insuring clause and this provision are clear and unambiguous and how can it be contended that to set these conditions out in such clear and unmistakable terms in the insuring clause, and to then provide that even treatment for a hernia caused by accident is sickness, does not render the policy ambiguous and what business man, though trained in general business and in examining the ordinary contract, would ever look upon or understand this policy to limit the right of recovery for accident in any such a manner.

Any other construction means that one who suffers an accidental injury that excites a hernia or gall bladder, does not dare to have surgical help, for no matter what accident befell him, his medical aid makes his case one of sickness.

We have not found a case where the courts have in any way based their decision upon the explanatory phrase that Medical Treatment or Surgery were sickness, even though the

policies contain the same provision as the one before the court and this clearly means and can only mean that the Medical Treatment referred to is the Medical Treatment for the thing that caused his death not that Medical Treatment for the hernia makes a death by accident for another reason, sickness. Here it may be said that the embolism caused the death and that the embolism resulted from or was brought about by a previous dormant thrombus. The Medical Treatment was not for the thrombus at all, but for the hernia operation and he did not die of the hernia operation, and here is where the trial court fell into error.

The Insured certainly did not receive any Medical Treatment for a pre-existing thrombus and he certainly did not receive any Medical Treatment for the pulmonary embolism that unfortunately resulted in his death.

While the case on its merits has been determined insofar as the proof that death was due to accident within the meaning of the insuring clause of the policy, we, nevertheless, feel that the case of *Clayton v. Metropolitan Life Insurance Co.*, *supra*, and the Missouri case of *Young v. New York Life Insurance Co.* 221 S. W. 2d. 843, and *Happoldt v. Guardian Life Insurance Co. of America*, 203 Pac. 2d. 55, as well as *Preston v. Aetna Life Insurance Co.* 174 Fed. 2d. 10 are especially applicable and if the matter is further considered, will be of assistance to the court. The case of *Happoldt v. Guardian Life Insurance Co. of America* is in point on the merits and is exactly what the Idaho Courts hold and have held. The case of *Preston v. Aetna Life Insurance Co.* is where the Circuit Court reversed a trial court in an accident case and this case is also in point on the question of what law governs here and the



duty of the Circuit Courts since the decision in the case of *Erie v. Tompkins*.

It is always quite easy to pick out certain answers of a witness when he is thoroughly examined and cross-examined, that make it appear that his testimony is contradictory, or that it supports a particular view. But any fair evaluation of Dr. Call's testimony shows conclusively that his theory in answering these questions and in making these answers could not be claimed to bring the case within the rule of law contended for by appellee and in support of this statement, we respectfully call to the attention of the court, Dr. Call's explanation to the trial judge as to what was a contributing cause: See Appendix "D".

It is very clear what Dr. Call meant and the value of his explanation and testimony in this respect is that it was elicited by the court.

### ANALYSIS OF APPELLEE'S BRIEF

That portion of the appellee's brief devoted to the merits of the cause and arguing and citing authorities to the effect that the death was due directly or indirectly or contributed to by bodily infirmity or disease, has been decided adversely to appellee in *New York Life Insurance Co. v. Wilson*.

And it is of no particular benefit to appellee to argue that the trial court's decision, though wrong, insofar as his construction of the exclusions of the policy is concerned, will nevertheless be upheld if any theory of the evidence will support it.

Appellant does not argue and could not argue that had the case of *New York Life Insurance Co. v. Wilson* been re-



versed and not affirmed, that appellant could even have proceeded in this case and it was for precisely this reason that appellant, with the consent of counsel for the appellee, requested the court that counsel be not required to file a reply brief until the first case was determined and the appellee must now rely upon the construction given by the trial court to the exclusions in the policy to uphold the trial court's decision.

The appellee seeks to argue that the law of Missouri is controlling in the instant case and that it can raise that question without any cross-appeal.

We do not really feel that it is very material as to what can or cannot be raised by appellee without a cross-appeal. We take no exception to the cases cited by appellee from the U. S. Supreme Court, but they certainly go no further than to hold that the court's decision upon the facts, even though made upon a misconception of the facts or an erroneous construction of them, will nevertheless be upheld if there are facts sufficient to uphold the decision upon any other theory.

We do, however, contend that this rule does not go so far as to permit the appellee here, after a direct finding against it, that the law of the State of Idaho governs, to raise the question that the law of the State of Missouri is applicable when that question is not before the court on appeal at all, unless properly raised by the appellee under a cross-appeal.

However, we fail to see how the application of the Missouri law would aid appellee in view of the holding of the Missouri court in *Wheeler v. Fidelity & Casualty Co.*, 251 S. W. 924 and the decision of the Missouri case of *O'Meara v. New York Life Insurance Co.* 169 S.W. 2d 116 where a hernia was involved. Appellee relies upon *Pope v. Business*

Men's Assurance Co., 131 S.W. 2d. 887, and Caldwell v. Travelers Insurance Co., 267 S.W. 907, both Missouri cases. All that Pope v. Business Men's Assurance Co. does is affirm and uphold Caldwell v. Travelers Insurance Co., and this case is not in point. It lays down a rule of law in Syllabus 1 that is in accord with the holding of the trial judge here and is directly in point in appellant's favor. In addition, this opinion reviews all of the Missouri decisions in similar cases previously decided and on Page 921 of the decision, names the Missouri cases that are in conflict and that will not be followed. It is very significant that the Supreme Court of Missouri did not in any way over rule Wheeler v. Fidelity & Casualty Co., supra, but says:

"All other cases from this court and the court of Appeals are clearly distinguishable on the facts" and thereby directly approves it and similar cases.

We have scanned the policy carefully. There is no provision that we can find stating that it takes effect only when signed and approved in the State of Missouri or that it is to be a Missouri contract. It is well known that these policies are stamped with a facsimile of the officers' signatures and that the policies are simply filled out and delivered after the application is received.

The appellee in its brief on page 33 says:

"The last act to make the policy effective was the acceptance by the insurance company of Mr. Wilson's application and the premium and the signing of the policy. This was done in Kansas City. The policy was probably mailed from the home office in Kansas City, but it was effective nevertheless even before it was mailed."

These are all suppositions. The policy does not support them and this policy certainly would not become effective

until Mr. Wilson had received it. It could not very well have been a binding contract until such time.

The policy did not provide that it was a Missouri contract or that it took effect only when signed or approved in Missouri for the simple reason that the laws of many of the States are much more favorable to the insurance companies in cases of this kind than the law in Missouri. The State of Missouri certainly cannot be listed as one of the States directly opposed to the Idaho theory. In many of the cases found on this subject, the courts will observe that the insurance companies that are Missouri corporations contend that the law of the State where the policy is held and where it is to be performed, are controlling.

Appellee under IX of its Points & Authorities cite four cases in support of its contention that the policy is to be governed by the laws of the State of Missouri.

The first case cited, *Meiers & Frank Co. v. Bruce*, 30 Ida. 732 is clearly not in point. The Idaho Supreme Court had before it a contract signed in Oregon, payable in Oregon and where all of the parties at the time the contract was signed, resided in Oregon.

In *C.I.T. Corp'n. v. Sanderson*, 43 Fed. 2d. 985, an Idaho case in the Federal District Court, is not in point on the facts or even similar and the court in that case laid down the rule:

“That the last act to be done to complete the contract governs as to the law.”

*W. W. Barber Co. vs. Hughes*, 63 N.E. 2d. 417, was a suit on a note and the holding was that it became effective in Illinois and that the contract is made where the last act takes effect. This case is not even similar.

Squire v. Eubanks, 294 N. W. 166—is a case where there was a suit on a note given to the bank who made a loan in another State.

Appellee cites only one case involving an insurance Policy. That is Prudential Insurance Co. of America v. Carlson, 10th Circuit, 126 Fed. 2d 607. In that case the policy provided that it was not to take effect until signed at the home office and the plaintiff alleged that it was a New Jersey contract and this was admitted in the answer.

We submit that not one of these cases is in point as to the facts and that they are not authority for overcoming the court's findings and decision that the Idaho law governs.

In this connection we call the court's attention to the testimony of Walter M. Jones, the agent for the company, called by the plaintiff as a witness. He testified that he was the branch manager of the appellee, who had come from Salt Lake City to represent the Appellee. T 121. He also testified:

“Q. What is your business?

A. Branch Manager for the Business Men's Assurance Company for the branch serving the States of Utah and part of Idaho.

Q. And Pocatello is in your jurisdiction?

A. Yes sir.”

T121.

He had also been in Salt Lake City since 1923 for the company. It is clear that the company was doing business in Idaho as a foreign corporation and that it had accepted the laws and the constitution of the State of Idaho.

Wilson's contract was to be performed in Idaho.

However, the burden was upon the appellee to prove that



it was a Missouri contract and subject to the laws of Missouri and this was pleaded.

The appellee had it in its power to prove the fact how the policy was delivered, whether by mail or agent. The beneficiary did not have this burden and the appellee pleaded it.

As we have heretofore shown and as has been called to the court's attention by quotation from the Browning case, on re-hearing, in our opening brief, the policy before the court provided:

"That disease, when used in this policy means sickness." (Page 24 of Appellant's original brief.)

Under the heading Argument 11 commencing on Page 22 of Appellee's brief, will be found the argument of appellee in support of its theory that the policy is not ambiguous and that the trial court did not err, but there is no analysis of similar provisions of policies, just a bald statement, that it is not ambiguous.

The appellee argues that because of the amount of the premium paid that there should not be a recovery. That question was raised in the former case and as bearing upon it, we cite the following:

Reynolds v. National Casualty Co., 101 S.W. 2d, 515

It is respectfully submitted that the judgment should be reversed.

B. W. DAVIS

*Attorney for Appellant*

Residence: Pocatello, Idaho.



## APPENDIX "A"

"The section of the policy termed the 'Insuring Clause' is as follows: 'Insuring Clause: Charles E. Shain (herein called the Insured) of City of Bronson, State of Iowa, against loss of life, limb, sight, or time, resulting directly and independently of all other causes from bodily injuries sustained through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.'

"The essential portion of Part "A", pertaining to accident indemnities is as follows: 'If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay: \* \* \* \* .'

"Part "K" which relates to the insurance coverage as to sickness is as follows:

'All diseases are covered by this Policy.'

"'Any accidental injury, fatal or otherwise, resulting in hernia, boils, carbuncles, felons, abscesses, ulcers, infection, septicaemia, ptomaine poisoning, cancer, diabetes fits, peritonitis, apoplexy, sunstroke, freezing, hydrophobia, sprained or lame back, shall be paid for as provided in Part H or I anything to the contrary notwithstanding'

"Part 'H' referred to in Part 'K', supra, relates to illness indemnity payments for confinement as the result of disease, and Part 'I' relates to illness indemnities for sickness that are nonconfining. The demurrer of the plaintiff to defendant's answer contends that it does not constitute a defense to plaintiff's cause of action; that the insured received a bodily injury caused solely by accidental means, which said accident caused a hernia, and that the insured died as a direct result of the injury sustained by him; that where a policy, in a specific clause, provides for benefits by clear and comprehensive language against death from bodily injury caused by accidental means, liability for such death will not be destroyed by language of the exceptions unless such exceptions are clear and free from reasonable doubt."

## APPENDIX "B"

### "The Insuring Clause.

"Against — (1) The effects resulting directly and exclusively of all other causes, from Bodily Injury sustained during the life of this policy solely through external, violent and accidental means of which there are external marks on the body of the Insured, hereinafter called 'such injury'; \* \* \*

#### "Part 1.

"Section (a) — The Monthly Indemnity for accident or Sickness, is *Forty* (\$40.00) \* \* \*

#### "Part 3. Monthly Accident Indemnity

"Sec. (a) If 'such injury' shall from the date of the accident totally, solely, and continuously disable and prevent the

Insured from performing each and every duty pertaining to any business or occupation, the Company will pay monthly indemnity, for such period of total disability (not exceeding twelve consecutive months) at the rate specified in Section (a) of Part 1. \* \* \*

#### "Part 15. Not Covered

"This policy does not cover suicide or any attempt thereat, same or insane, or hernia (except that in the event of disability or loss resulting from hernia or operation therefor, the company will pay the monthly indemnity provided in Part 1 for the period of such disability, not exceeding fourteen days)."

The court in determining the matter favorably to the insured, held:

"But appellant contends that Part 15 limited appellee's coverage for hernia to fourteen days; Part 15 expressly so provides. Thus, we have a direct conflict between the coverage provided by Parts 1 and 3 and the coverage provided by Part 15. Part 15 does not fall within the 'conditions and limitations' provided for in the first paragraph of the policy, but is a withdrawal of hernia from the coverage at the rate of \$40 per month. This conflict creates an uncertainty and ambiguity in the construction of the policy, and invokes the following rule: \* \* \*"

#### APPENDIX "C"

"It is contended by the company that, since the evidence in this case shows that there were no contusions on the body

of the insured, and no outward signs on his body of the injury sustained, under the provisions of the policy the disability would be construed to arise because of sickness and not be paid for as an accident. We are unable to agree with this contention. It is true that there were no signs on the body of the insured of the accident, yet it does not follow that under the terms of the policy the disability arose because of sickness. Counsel for the plaintiff in error have misconstrued paragraph E of the policy. This paragraph does not say that in the absence of any cut or contusion the disability shall be deemed to arise because of illness, but says that injuries, fatal or non-fatal, which do not produce immediate total or partial disability or which do not produce a visible contusion, etc. An injury which produced immediate total disability would not be deemed disability arising because of sickness. Nor would disability arise where there was a visible contusion or cut. These two types of injuries are connected in the policy with the disjunctive or. An injury under either of the two classifications would be covered by provision A of the policy. If the policy intended to provide that every injury which did not produce a visible contusion, wound or cut should be considered as illness rather than accident, it would have been meaningless and absurd to have referred in the policy to an injury which produced immediate disability."

## APPENDIX "D"

"The Court: I would like to have the doctor reconcile this answer, or rather the answer to the question previously asked with the answer to Mr. Merrill's question. He answered

Mr. Merrill's question that it was (61) a contributing cause.

A. We always have a contributing cause.

The Court: Regardless of any death certificate, doctor, you answered Mr. Merrill's question in which you said that the operation was the contributing cause of his death. Now, you may reconcile that answer with the answer to Mr. Davis that this was an accident within the definition given in the dictionary.

A. I think maybe I could do better if I may use an illustration?

The Court: Certainly, that is all right.

A. If you were riding in a car and the car was being driven over a road where there was a large chuck-hole unforeseen by the driver—the driver hits the chuck-hole and throws the car over and one is killed, the driving of the car is the contributing cause, just as the hernia is the contributing cause here.

Q. How would the hernia be the contributing cause?

A. Well, you might say, it takes the patient away from his normal way of living.

Q. It is your opinion that the man would not have died without an operation for hernia?

A. That is right.

Q. And with reference to driving the car and hitting the chuck-hole, the snoring and breathing is that comparable to the chuck-hole? (62)



A. That's right.

Q. Then you testify that if the man had not had the hernia this choking would not have occurred and that the hernia is not the cause, or did not cause death?

Mr. Merrill: Objected to as argumentative and leading.

The Court: It is, but that is the question we are trying to get at here.

A. In putting that question to me, the answer is again, that the snoring is comparable to the chuck-hole in the road.

Q. Dr. Call, you have made answers here that would indicate, if you understood the way counsel was asking the question, that the hernia operation caused the death. Now, as I understand it, the fact that he was there— is that what you mean doctor, the fact that he was in the hospital for an operation put him in the position for the other thing to happen and that the other thing caused his death?

A. That's right.

Q. And that is your studied opinion?

A. Yes sir.



